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THE

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OR

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The Legal Observer.

VOL. IV. SATURDAY, MAY 5, 1832. No. LXXXI.

> ——— "Quod magis ad nos
> Pertinet, et nescire malum est, agitamus."
>
> HORAT.

POPULAR LEGAL AUTHORS.
No. II.

MR. PRESTON.

WE had some difficulty in selecting from the increasing class of legal authors, one decidedly superior to the others; nor are we sure that we were right in assigning the first place to Sir Edward Sugden[a]. Be this as it may, we have had no hesitation in our choice of the second, for by no one is this rank so well deserved as by Mr. Preston, who won his first honours by his writings, and whose reputation as an author must endure as long as the present law of property shall remain in force. The legal profession, and through them the public, are under great obligations to him who chooses to lay before them the result of his industry and talents;—to him who is willing that the stock that he has acquired shall not remain hoarded up in his own breast, but shall be freely used by all, during his life-time, and shall remain for the general service after his death. This remark is particularly applicable to legal learning and to its possessors. As far as mere sordid self-interest is concerned—a feeling, we are afraid, to which our own profession is peculiarly exposed—it were much better for a man of unusual talent and industry, who has chosen the law as the field for his exertions, to keep his knowledge to himself—to lock it up for his own use, and guard its escape to others with the most watchful jealousy. Let him not imagine that his light will long remain hidden under a bushel; the opportunity must arrive when his superior qualifications, if he have them, will be discovered; and let him be sure, if he looks simply to his own interest, that it will be far better to await this time, than, by a premature discovery of his labours, to make known in a day all he has been amassing for years; to put tools in the hands of others, which, if he had pleased to wait, he might have monopolized for his own particular purposes; to kindle a fire which shall diffuse a general light to all, when he might have concentrated its rays to guide him to his own hard-won treasures. Let him not therefore, to come to plain language, if he would attend to his own interest, *publish a book* which shall make every one as wise as himself. If, however, he can rise superior to so mean a sentiment, let him do all this, and place himself beside those whose name will not die with them; who will not be simply remembered as "a man in large practice many years ago," but enjoy a far more durable reputation.

Mr. Preston has been one of those who have freely laid before the profession the result of their labours. He has been no niggard of his acquirements, but has freely shared them with others; and we confess that we cannot approach the consideration of his works without a feeling of regard and respect that almost disarms us of our critical weapons; nevertheless we so heartily dispise unvaried eulogy ourselves, that we shall endeavour to divest ourselves of this feeling, and give a plain straight forward opinion as to the merits of his principal writings.

The first work which Mr. Preston published we have always considered his best. It was written, we believe, before the author was twenty-one, and as he frequently observes, with very pardonable complacency, "has continued in the profession ever since."

[a] See 3 L. O. p. 49.

We mean the first edition of the Treatise on Estates, which was a small octavo volume, printed and published at Exeter in 1791, by "Richard Preston, of Ashburton," who was at this time, we believe, an articled clerk to an attorney. It is stated in the preface to be "the production of a young man, who, young as he is, and weighty as the objection to a perusal of his book may be on that account, can with confidence affirm that he has studied to supply, by industry and application, what he wants in age and maturity of judgment." A second edition of the work has been published, after a long interval, which is proposed to be enlarged into several volumes, but it has not met any very great success; and, for our own parts, we much prefer, in this instance, the vigorous effort of the youth, to the more refined but somewhat diluted improvements of the sage.

The work on estates immediately attracted the attention of the profession, and obtained a great deal of approbation from those who were best qualified to give it; and thus encouraged, our author published his "*Accurate View of the Rule in Shelley's Case*," (Exeter, 1794,) in which he confesses his "partiality for the profession and its practice in the conveyancing line." This tract, however, contained very little that was new; being, in fact, merely a new arrangement of a part of Mr. Fearne's celebrated work. Our author had by this time entered himself of the Inner Temple, although, we believe, he still continued at Exeter. Soon after the publication of this tract, Mr. Butler, with great kindness and liberality, wrote to Mr. Preston, begging him to come to London, assuring him of the success which his talents and industry must obtain for him, and offering him every assistance in his power. Thus encouraged, he commenced his career in the metropolis, and soon met the attention he so amply deserved. In 1797 he published his "Tracts on Cross Remainders," &c. dedicating them to Mr. Butler. They are very acute and ingenious, although hardly of sufficient practical importance. Mr. Preston probably soon became so occupied by business that his time did not permit him to publish; but he was gradually collecting, in the shape of lectures to his pupils, those stores which he has since given to the profession; and his subsequent works, entitled "A Treatise on Conveyancing," and "An Essay on Abstracts of Title," are parts of this course.

The most elaborate work of Mr. Preston's is, certainly, the Treatise on Conveyancing, the first volume of which was published in 1806, and has gone through three editions, the last of which was published in 1819—1821. It is dedicated to Mr. Butler, and the author declares that the approbation which that gentleman expressed of the work, in manuscript, "was one of the principal inducements to its publication." He also evidently alludes, in terms which do him great honour, (for successful men are too apt to forget their early benefactors) to the kindness which Mr. Butler had shewn him in the early part of his life. "Posterity (he says) will do ample justice to the liberality with which you have countenanced those whom you thought likely to become useful members of the profession. I consider myself only one of many who have been raised into notice under the protection of your patronage and good opinion, and I shall ever retain a grateful sense of the obligations I owe you." We have no hesitation in saying that this work is one of the most able and useful that can be found, or placed in the lawyer's library. It is full of learning, the most satisfactory and important; it is written in a style so agreeable and easy, that it is readily comprehended by the student, whilst it recommends itself to the practitioner by the great pains and thought bestowed on every sentence. Its fault is, that it is still incomplete—it is only a part of a grand scheme of a "Treatise on Conveyancing;" it is merely by the rule *Ex pede Herculem*, that we can judge of its merits. Thus, one entire volume and a part of another are devoted to Recoveries, Fines, and the deeds connected with them; the rest of the second volume is confined to the consideration of the Lease and Release; and the third consists of a treatise on the doctrine of Merger. It is evident, therefore, that the author has only given us parts of the great whole which he meditated, and which we fear will continue incomplete.

Mr. Preston is sufficiently profuse in his dedications. He always has one, and sometimes two, to each of his volumes. Thus the first part of the second volume of the Conveyancing is dedicated to Mr. Lancelot Shadwell, the father of the present Vice-Chancellor; and the second to Sir Samuel Romilly.

The work "On Abstracts of Title" is, perhaps, the most popular and familiar of all Mr. Preston's works. It was published in 1818, and reached a second edition in 1824. The three volumes which compose this work undoubtedly contain a great deal

of valuable information, which was unknown to the profession before it was here published; but, nevertheless, it is the work the least to our taste. Its arrangement is extremely faulty, so that it is full of repetition. Indeed almost sixty pages of the first and third volumes are nearly the same. Besides, the author is too fond of wasting his strength on points comparatively useless to the practitioner. Neither does he bestow sufficient pains in adducing authorities for his positions, but is too frequently satisfied in leaving a somewhat questionable opinion to be supported only by his own authority, or to refer to some book generally, where he thinks it may be found. Thus, in the work on Abstracts, he says, that "some cases on this head may be found in the Reports of Mr. Vesey, junior;" which is rather an unsatisfactory reference when a person is in a hurry, considering that there are nineteen volumes of these reports. In this the work will not bear a comparison with the writings of Sir Edward Sugden, and most other modern writers, whose opinions are always amply supported by authorities. But the great fault of the work has always appeared to us to be, that it is not written evenly, with reference to the subject matter. At one time, the author goes to the depths, —at another, he barely skims the surface. In one place, he is almost too profound and recondite,—in another, he contents himself with first principles. It is not, therefore, a complete work on the important branch of conveyancing to which it relates.

Mr. Preston's works were now fast forming a library of themselves; but he was still desirous of adding to the stock of professional knowledge; thereby furnishing a proof, if proof were wanted, of the abundance of spare time which a man of the largest practice has, whose early habits, as to the disposition of the twenty-four hours, have been good. In 1820 he published his valuable edition of Sheppard's Touchstone; confessing, however, in his preface, with some *naïveté*, "his opinion, formed on the most mature reflection, that the number of law-books, increasing as they are from day to day, is an evil of great magnitude, rendering the study of the law more perplexing from the diversity of opinion, induced by diversity of language, besides dividing and harassing the memory." He also takes the opportunity of complaining of the edition published by Mr. Atherley, as having "excited his surprise, not to say his indignation. He found many of his manuscript observations embodied into that edition, even word for word." This may, however, be considered a tribute to the value of Mr. Preston's annotations. And it is proper to observe, that he has never shewn any want of liberality to others in the use of his labours.

Mr. Preston has also edited Watkins on Conveyancing, with much ability; and we believe we have now gone through the catalogue of his professional works.

The learned author, besides these works, has launched two little shallops into the sea of general literature. In 1815, when he was in Parliament[b], he was one of the thousand and one pamphleteers on the Corn Bill. And in 1816 he published a "Review of the State of the Landed and Agricultural Interests;" but we may say, without offence, that we much prefer his writings on conveyancing to his political *brochures*.

We have thus endeavoured to give an unbiassed and impartial view of the works of this able and useful author, and we cannot take leave of him without expressing our gratitude to him for the service he has rendered to the profession. We are not sure that his career as an author is closed, and we hope not, as whatever comes from his pen must be, in some way, valuable and instructive.

LAW LECTURES.

Although the regular lectures, or readings, have been now for some time discontinued in the Inns of Court, yet attempts have been made, from time to time, to supply their place. Thus, in 1758, Mr. Danby Pickering undertook to deliver a course of law lectures in Gray's Inn, in consequence of an order from the heads of that society. In 1796, Mr. Michael Nolan published a syllabus of a course of lectures, intended to be delivered in pursuance of an order of the Society of Lincoln's Inn. Subsequently, Sir James Mackintosh delivered lectures on the Law of Nations, in the Hall of the same society; which was also chosen by Mr. Chitty, for the delivery of his lectures on Pleading. There is therefore plenty of authority for the appointment of lecturers by the several Inns of Court.

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[b] He was returned to Parliament by Lord Clinton, as it was said, in return for his exertions in "that great case of *Cholmondely* v. *Clinton*."

LEGAL BIOGRAPHY.
No. I.

SIR SAMUEL ROMILLY.

[*Concluded from* vol. 3, *p.* 385.]

We gladly enter on the remaining portion of the life of Sir Samuel Romilly, which we have reserved for the consideration of his exertions in the improvement of the Law.

In the course of this work, we have had frequent occasion to notice "the progress of Law Reform;" and it will be peculiarly within the scope of our plan to notice the series of measures to which Sir Samuel Romilly directed his attention, during the twelve years that he sat in parliament.

One of his earliest speeches, namely in January, 1807, was in support of the bill for the liability to simple contract debts of freehold estates; and the character of his mind—his just and honorable feelings—are well illustrated by his opening observations, which we are the more induced to quote, as they bear on the alterations now proposed in the law of debtor and creditor;

"What, (said he) is to prevent the owner of estates (if he be a man of extravagant habits, loose principles, or of that unmeaning profusion which prompts him rather to be generous than just), from defrauding his creditors? He may have incurred simple contract debts to an enormous amount, and instead of leaving sufficient means, at his death, to satisfy his creditors, he may be found, with a caprice well worthy of his prudence, to have transferred to some stranger the whole of that estate which had been the source of their confidence, and which ought to be the fund of their remuneration. No matter how capricious or wanton the will itself, that constitutes this stranger heir. His title in *law* is indisputable to that property which, in common *justice*, ought to have been another's. He may look with indifference upon the claims of creditors, who have, unfortunately for themselves, founded them upon no stronger principle than the honour of their debtor.—But it is not for the legislature of a great commercial country to look with indifference upon any measure that tends to shake that generous confidence which is the support of British credit, and the pride of British commerce.

"But even if the law itself was not objectionable, still the *abuses* of which it has been productive, would sufficiently warrant its abolition: How many have unhappily occurred even within the recollection of the present age! How many instances might I relate of men, possessed of freehold estates, who finding themselves sinking beneath accumulated embarrassments, have resolved on the desperate alternative of depriving themselves of existence, and thus, by a sort of posthumous injustice, to put out of the reach of their creditors every possible means of recompense or redress! Strange as it is that a law which sanctions such abuses should be permitted to exist in any country, it is still more unaccountable that it should be peculiar to England."

This proposition was seconded by the Attorney-General, Sir Arthur Piggott. The eloquent and learned speech from Sir Samuel was heard with marked attention. Mr. W. Wynne expressed a hope that the latter would not stop here, "but apply his mind to a similar consideration in respect to the *living* as well as of the dead:" yet, on the third reading of the bill, it met with a powerful opposition, especially on the part of the Master of the Rolls. On the question of the third reading, there appeared, for it, 47; against it, 69.

Notwithstanding the bill was thus lost, Sir Samuel again brought the subject before the legislature; and it received its sanction, under the form of an act "for the more effectually securing the payment of the debts of *traders*." On this occasion, he made a few judicious alterations, and gave a preference to specialty creditors.

At a very early period of his life, Sir Samuel had directed his attention to the subject, which so peculiarly distinguished his name,—that of the *criminal code*. His letters abound with remarks on the subject. To these we shall have another occasion to refer; and for the present shall extract, from one of his speeches, an explanation of the motives by which he was actuated.

"It was not," he said, "from light motives, it was from no fanciful notions of benevolence, that I have ventured to suggest any alteration in the criminal law of England. It has originated in many years' reflection, and in the long-established belief that a mitigation of the severe penalties of our law will be one of the most effectual modes to preserve and advance the humanity and justice for which this country is so eminently distinguished. Since the last session of parliament, I have repeatedly re-considered the subject: I am more and more firmly convinced of the strength of the foundation upon which I stand; and even if I had doubted my own conclusions, I cannot forget the ability with which I was supported within these walls; nor can be insensible to the humane and enlightened philosophy by which, in contemplative life, this advancement of kindness has been recommended. I cannot, therefore, hastily abandon a duty which, from my success in life, I owe to my profession; which, as a member of this house, I owe to you and to my country; and which, as a man blessed with more than common prosperity, I owe to the misguided and unfortunate.

"Actuated by these motives, it is not to be imagined that I shall be easily discouraged by any of the various obstacles so commonly, and perhaps with propriety, opposed to every at-

tempt to alter an established law: upon such a resistance I calculated, but am not to be deterred. I knew that my motives must occasionally be misunderstood by many, and might possibly be misrepresented by others. I was not blind to the road where prudence pointed to preferment; but I am not to be misled from comforts which no external honours can bestow. I have long thought that it was the duty of every man, unmoved either by bad report or by good report, to use all the means which he possessed for the purpose of advancing the well being of his fellow creatures: and I know not any mode by which I can so effectually advance that well being, as by endeavouring to improve the criminal laws of my country. It has been insinuated, that, indebted as I am to the law, commendation rather than censure ought to be expected from me; and it has been asserted, that under the pretext of proposing apparently immaterial alterations, my real object is to sap and undermine the whole criminal law of England. Such insinuations and assertions have not, I am well aware, been made by any of my honourable and learned friends by whom I am now surrounded, and who have witnessed my whole professional life; but they have been made, and, I must of course suppose, have been really believed."

In 1807, he disclosed his long meditated plan of reform; and, in order to lay the foundation of his alterations on facts, he moved for certain returns, with a view of ascertaining the effects of the old system. From these it appeared, that in the course of three years, 19,178 prisoners had been tried for their lives in the United Kingdom, of whom no less than 9,510 were convicted, and 327 only executed. His first proposal was directed to the alteration of the statutes respecting petty thefts. He also wished to introduce a new practice in favor of the innocent. It is well known, that any one may be imprisoned, tried, and perhaps ruined, both in respect to character and property, on the oath of another, grounded solely on plausible, but ill-founded suspicion.

After some compliments and observations from Mr. Wilberforce, in favor of the principle, and a few remarks from Sir F. Burdett, respecting the power of certifying, proposed to be ceded to the judges, the new Solicitor-General opposed the bill. Notwithstanding this, on the 15th June it was moved, "that the House do resolve itself into a committee of the whole House, on the Private Stealing Bill." This having been granted, Sir Samuel made a very able reply. A clause was then added by the Solicitor-General, and the measure stood over till the next session.

It has been sometimes objected to Sir Samuel, that he did not rather apply himself to the correction of those abuses which had so long cast a discredit upon the court in which he practised; but it ought surely never to be regretted that he preferred the nobler labour of reforming a code, the impolitic severity of which had for centuries disgraced the institutions of our country. That portion of the community which is affected by our civil polity, are rarely without the means of making their complaints heard; but the poor, the destitute, the uninformed, and the misled, the objects upon whom our criminal jurisprudence operates, have no voice to protest against the severities which the legislature may please to denounce. To watch over the interests of this wretched and degraded portion of society; to become the friend of those against whom every other hand was raised, and the protector of those who were abandoned, even by themselves, seemed to Sir Samuel Romilly, a duty which claimed a decided pre-eminence [a].

In 1810, he proposed no less than three bills, to repeal the statutes 10 and 11 W. 3, 12 Ann., and 24 G. 2., by which the privately stealing in a shop goods to the value of five shillings, or in a dwelling-house, or on board a vessel in a navigable river, property of the value of forty shillings, were held to be capital felonies. The speech delivered on this occasion was afterwards published, under the title of "Observations on the Criminal Law of England." Notwithstanding the able arguments with which Sir Samuel Romilly supported the principle of these bills, and the industry with which he collected, and the clearness with which he expounded a vast body of facts in confirmation of his arguments, all the bills were lost—the first in the Lords, and the second in the Commons, the third being postponed, and at length withdrawn.

In the year 1811, however, Sir Samuel Romilly had the satisfaction of carrying through two bills, to abolish the punishment of death for stealing from bleaching grounds; and in 1812 he succeeded in procuring a repeal of the act of Elizabeth, making it capital in soldiers and mariners to be found wandering about the realm without a pass.

Although it was not his good fortune to witness the success of many of the measures he advocated, the good seed which he and his fellow-labourers sowed was not cast upon a barren soil. Several of the great improvements, which he had so much at heart, have

[a] Roscoe's Life of Sir Samuel Romilly.

been carried into effect since his death.—Thus the punishment of death for the offence of privately stealing in a shop to the value of five shillings, and stealing goods to the value of forty shillings on board a vessel in a navigable river, have been repealed, and transportation or imprisonment substituted. The value of goods stolen in a dwelling-house, necessary to render the offence capital, has been raised from forty shillings to five pounds. The practice of placing spring-guns for the protection of game, which he reprobated as both cruel and illegal, has been also forbidden by statute.

Amongst the various measures which he contemplated for the reform of the laws, he introduced a bill, which subsequently passed into a law (46 G. 3. c. 135), for the amendment of the *bankrupt laws*; and subsequently, he effected a further improvement in the same department by the provisions of the statute 49 G. 3. c. 121.

In 1811, he stated his views in parliament regarding the delays in Chancery; and in 1813, entered very fully into the consideration of the expediency of the Vice Chancellor's appointment. In the latter year, and the preceding one, he enlarged upon the defects of the Ecclesiastical Courts—a subject to which we have recently called the attention of our readers.

The subject of Insolvent Debtors also engaged his attention; and in 1815, and subsequently, he devoted considerable time to its investigation.

Notwithstanding the importance of these subjects, many others also attracted his observation; namely, the Game Laws, Tithes, the Welsh Judges, &c.:—all of which, it is curious to observe, have since undergone parliamentary investigation, and in many respects the evils complained of have been removed, or essentially mitigated.

We have already detailed the political events in which Sir Samuel was engaged prior to his melancholy death: but we cannot conclude the present notice without adverting to the affecting narrative which Mr. Peter has given of the circumstances, and which we shall not attempt to alter.

"The declining health of Lady Romilly, which had been to her husband for several months a source of uneasiness and anxiety, at length excited in his bosom the most serious alarms. During a residence of nearly two months at Mr. Nash's seat in the Isle of Wight, where he had taken her for the benefit of a milder air, his mind continued in a state of unceasing agitation—fluctuating at each turn of her disorder between alternate tides of hope and despair. In a letter to his friend Mr. Dumont, of the 27th of September, he says, 'Since I last wrote to you, Anne has been worse, and was certainly considered by both her medical attendants as being in some danger. She is at present a little better; but for myself I still apprehend the worst. I take care to let neither her nor the poor children see the anxiety I feel; but it costs me a good deal. With all this, do not suppose that I have not quite resolution enough to undergo every thing, and to preserve my health for my children's sake.'"

A few days after the date of this letter, (continues Mr. Peter) Mr. Dumont arrived at Cowes, where he found Lady Romilly so much better as to be able to spend two or three hours each day in the society of her friends. This temporary improvement, however, was soon followed by a severe relapse, and by several days of acute suffering; during which the anguish of her husband could only be equalled by the pious fortitude and resolution with which he endeavoured to suppress his feelings. Though for a long period he was either a stranger to sleep, or had his sleep disturbed by the most terrific dreams; though at times he believed his faculties to be impaired, and began even to entertain fears of mental derangement; he still recollected the duties which he owed to his family, to his country, and to his Creator. To the last moment of his reason, he continued to struggle with the sorrows which were overwhelming him. Whatever time remained to him from his attendance in the sick chamber of his wife, was devoted to his children and surrounding friends. With Mr. Dumont, in particular, he frequently held the most intimate and unreserved conversations; entertaining him with prospects of the future, and with plans for the education and establishment of his children in life.

"About the middle of October, his sister, whom he tenderly loved, had come with her daughter to the Isle of Wight, at his own express desire, and was followed by the two sisters of his wife; but, though grateful for this proof of their kind attention and regard, he met them without a tear, or any visible emotion. Lady Romilly died during the night of the 29th of October; but the event was not communicated to her husband until the following morning. He heard it with apparent resignation, and without any violent effusions of grief. On the same day he was removed by his anxious friends from the scene of his sorrows, and arrived in London, by easy stages, on the 1st of November. During

his journey he had been frequently much agitated, and as he approached home his feelings became more violent. On one of these occasions, as he was shutting his eyes and wringing his hands, Mr. Dumont, who had accompanied him from the Isle of Wight, took the hand of his daughter, and placed it in his; upon which, opening his eyes, and casting on his friend a look expressive of gratitude and affection, he tenderly embraced his daughter.

On his arrival at his residence in Russell Square, he made repeated but ineffectual efforts to compose his mind; and throwing himself on a sofa, joined his hands together for some moments, as if in a state of prayer. He was now apparently calm; but his tranquillity was more frightful to his friends than even his former violence: it had the aspect of a man dying from some internal wound. Dr. Roget, who had attended his uncle from the commencement of his illness, and watched over his couch with all the pious care and devotion of a son, was soon after their arrival in London, joined by Dr. Marcet, and on the following morning by Dr. Babington. But their efforts were vain: long suffering had suspended the faculties of their unhappy patient. His mind became deranged—his heart was broken—and, in the violence of phrensy, he terminated his own existence.

"In person," says Mr. Peter, "Sir Samuel Romilly was tall and justly proportioned, with a countenance regular and pleasing, but tinged with deep shades of thought, and susceptible of the greatest or tenderest emotions.[a]. His manners were distinguished by singular modesty, unaffected simplicity, and the kindest attention and regard to the wishes and feelings of others. His habits were temperate, studious, and domestic. No man ever indulged less in those pursuits which the world calls pleasure. He rose regularly at six o'clock; and was occupied, during the greater part of the day, and frequently to a late hour at night, either in study or laborious attendance to his professional and parliamentary duties. What little intervals of leisure could be snatched from his toils he anxiously devoted to domestic intercourse and enjoyments. Moderate in his own expences, he was generous, without ostentation, to the wants of others; and the exquisite sensibility of his nature was never more strikingly displayed than in the fervent zeal with which his professional knowledge was always ready to be exerted for the destitute and oppressed, for those who might seem, in their poverty, to have been left without a friend. Even to the last, when sinking under the weight of domestic affliction, when anticipating as its probable result a wretched life of mental malady and darkness, he was still intent on the welfare and happiness of those around him. The religion of Sir Samuel Romilly was, like his life, pure, fervent, and enlightened. Unclouded by superstition or intolerance, it shone forth in pious gratitude to God, and in charity to all mankind."

[a] It is said that Lord Thurlow, on first seeing him at the bar, enquired who it was "that looked so like a famished eagle."

CHANCERY REFORM.

SUBSTANCE OF THE INTENDED NEW BILL.

It is proposed to abolish the *Subpœna* Office, *Affidavit* Office, the *Six Clerks'* Office, so far as relates to proceedings on the equity side of the Court, and the Office of Sworn Clerks and Waiting Clerks.

It is then proposed to establish a *Writ* Office, with two Masters and two Clerks, to be appointed by the Master of the Rolls; a *Record* Office, with two Keepers and four Clerks; an *Affidavit* Office, with the senior Master of the Writ Office for Master, and two Clerks.

It proposes to abolish the *Report* Office, the entering department of the Registrar's Office, and the Office of Clerk of the Exceptions; and appoints six Registrars with six Clerks. Messrs. Raynsford, Bedwell, Fry, Colville, Collis, and Le Cointe, to be Registrars, and Messrs. Walker, Bicknell, Standen, Hussey, Bedwell jun., and Munro, to be the Clerks.

An Office, called the *Audit* Office, to be established, in which the duties relating to the effects of suitors are to be performed by a Master (the senior Registrar) and seven Clerks.

Decrees, orders, reports and records, now in the Registrar's Office and the Report Office, to remain in the custody of the senior Registrar, under whose direction all copies are to be made.

No person to be appointed a *Master in Chancery*, unless he shall have been called to the bar and practised as a barrister for ten years.

Masters to hear and determine such interlocutory matters, arising in suits or otherwise, as the Chancellor, by general order, shall refer to them, subject to an appeal to a proposed *Court of Masters*, which is to consist of four Masters, (three to form a Court), and sit once a week or oftener, as the Chancellor shall direct. The Chancellor to determine their jurisdiction by gene-

ral order, and to have the power of adding fresh members to the Court; the appointment to be for a fixed period, unless the Master himself shall apply to be removed. The decision of the majority to be final, except in cases where by general order it shall be made subject to an appeal to the Chancellor.

An Office for *Summonses and Appeals* to the Court of Masters to be established.

The Masters to sit in open Court on such matters as the Chancellor by general order shall direct.

No person to be appointed *Chief Clerk* to a Master, unless he shall have been admitted and practised five years as a solicitor.

No person to be compelled to take a copy of any paper or document brought before a Master, nor to take a copy of more than he requires of such paper or document.

No costs but those of passing the accounts of receivers, consignees, and committees, to be taxed by Masters in Ordinary; but three Taxing Masters, with two Clerks, to be appointed by the Chancellor.

All officers appointed under the act to hold their offices during good behaviour, power being reserved to the Chancellor to reduce the number of Clerks.

Sums hitherto paid to the abolished offices are directed to be paid into distinct funds, appropriated to the new Offices; but such of the fees paid to the Registrars, and their Clerks, as the Chancellor may fix, are still to be retained by them.

The *salaries* of the Masters are fixed by the bill as follows:—Masters in Ordinary, 2000*l.* a-year; their clerks 500*l.* a-year; Taxing Masters 1200*l.* a-year; their clerks 500*l.* a-year, besides certain fees, of an amount to be specified.

No officer or clerk to accept any fee or *gratuity*, but such as the Chancellor may fix.

Compensation to be allowed to officers whose offices are abolished or fees diminished, and a superannuation allowance after forty years service, or in case of permanent sickness, to be made to Registrars, if there shall be a surplus of the Registrars' funds; any deficiency of funds for any of the above purposes, to be made good out of the Dead Fund.

The *Vice Chancellor* to exercise the same independent jurisdiction as the Master of the Rolls (excepting matters in which the Master of the Rolls has a peculiar jurisdiction, as Keeper of the Records); and to to hear all causes and matters depending in Chancery.

Any solicitor accepting any office under the act to be struck off the rolls.

Examiners authorized to administer oaths to witnesses.

Power is reserved to the Chancellor to make general orders, regulating the practice of the new offices, and the duties of the several officers.—[*Law Magazine.*]

ON THE EXPEDIENCY OF A GENERAL REGISTRY.

No. V.

If I am right, in supposing that scarcely any mischiefs attending the present system of conveyancing, would autherize the adoption of a plan which should expose every transaction in land to the risk of being defeated by the omission of some new formality, it will follow, that whatever changes are made, some other means must be taken to induce compliance, rather than a forfeiture of the property, in case the prescribed forms are not adhered to. I do not apprehend any great difficulty in finding means which will not be troublesome in practice, and which will be nearly, if not altogether, as efficacious as registration.

Let it be understood, that no new formality is required for the purpose of having as valid a conveyance as at present; but that if any person wishes advantages to be obtained which are incompatible with the present system, he must adopt some additional forms, which shall be prescribed. In order, however, that every person taking a conveyance may be informed that it would be advantageous to adopt those new forms, I should propose, that the solicitor should be subject to small penalties, in case of their being omitted; provided that the parties taking the conveyance do not declare that he wishes these formalities to be dispensed with.

Every soliciter should be provided with a printed paper, stating the new forms to be observed; and if, for any reason, the party wishes them not to be complied with, let him sign his name to one of those printed papers, in which he should declare that he had heard it read over. A double advantage would be thus obtained; the solicitor would be more cautious in the execution of deeds, and it would become more generally known what requisites are desirable to give the greatest possible effect to a deed. No danger would be incurred to which transactions are not now liable: but it may be contended, that if it be not compulsory, it is in vain to expect that any new formalities will be observed. Fortunately we are not left in doubt upon this subject; two forms having been introduced in Scotland, without any formal enactment, the omission of which would now make objectionable a deed which should have all the statutory requisites. It is known, that the place where, and the day

when executed, by each party, are now invariably stated in a Scotch deed, and that these improvements are only sanctioned by long practice.

But may not the solicitors complain that the imposition of new forms would be too onerous to them, and that it will be unjust to make them liable to penalties for the omission? I cannot think so; that which they will have to perform every day will become as easy as the forms now used. Does any solicitor ever complain of the trouble attending the execution of a will of lands, or of a power of attorney for the transfer of stock? Or does he ever fail in having these instruments properly executed? I think we may confidently affirm that he does not, because these forms are invariably to be observed upon similar occasions. At the first bringing these modes of execution into operation, I think it very probable that the solicitor would sometimes omit them; but he would still be less liable to the omission, if they were to be invariably used upon every occasion when he attests the execution of a deed.

The difference between making these forms essential, and the prescribing the use on pain of a small penalty, is, that by the latter mode, the new system may be introduced into practice by degrees; by the former, some loss of property cannot be avoided before it can be well established in practice. Of the penalties, the solicitor cannot complain, because he will have a very easy mode of avoiding them; and every office will be provided with the printed declaration, to be used upon the request of the party taking the conveyance.

Concluding that whether we are to have registration or not, the commissioners will first apply their interpretative clause, to make one word stand in the place of three, now used in our deeds; that two deeds are no longer to be required to complete our transactions; that the interference of the Ecclesiastical Courts will be dispensed with. I shall, at present, refer to one only of the means which have been proposed, to make the transfer of property more secure, by the indorsement of notice of a subsequently executed deed upon the one immediately preceding it in date. When it is admitted that this indorsement cannot supply the place of the registration of a copy of a deed, in case the deed should be lost, it really appears to me, that no other valid objection remains to this plan. It is only a short notice of the deed that is required to be indorsed, and if there can be any doubt of the proper deed upon which the indorsement is to be made, it may easily be made on two or more.

The objection arising from duplicates will be obviated by requiring that only one engrossment shall be executed; and to those who are acquainted with the rule which regulates the notaries in making only one grosse of an instrument or regulation to this effect, will seem a matter of no difficulty. It may be provided, that each person taking any partial instrument under a settlement, shall have a copy of the deed signed by the trustees. This copy, if a notice of it was indorsed upon the settlement, would also operate as the commencement of a chain of title by which the purchaser or mortgagee of this partial interest would be assured that no prior assurance of this interest could have been made.

If a right were also conferred upon second mortgagees, to induce a notice of these mortgages upon the first incumbrance, I should think that equitable and secondary interests might be safely relied upon as securities. If, in addition to these changes, the Scotch mode of dating and attesting instruments were adopted, with some modification, I apprehend that in a very short time, so great an improvement would be effected in our conveyancing, that even the most ardent admirers of registration would cease to regret its non-adoption. It is to be expected that parties would generally require all the new forms to be observed; but if they did not, it would be no trifling advantage to have it known to all persons who invest money in purchases or mortgages, that it will depend upon themselves to obtain a very high degree of security for their transactions.

A.

ON THE GRAND JURY SYSTEM.

It is incumbent upon us, in the execution of the comprehensive plan of this work, to notice every department of the administration of justice; and the various modes of procedure, by which its ends are sought to be attained. Amongst these, it seems to have been taken for granted, that *Grand Juries* are essential to the due execution of the criminal laws. The searching spirit which now pervades every establishment and institution of the country, whether judicial, political, or otherwise, has at length entered this apparently neglected field; and it is probable that the enquiry, once opened, will not be closed until the system shall be considerably altered, if not essentially changed.

For this investigation we are indebted to Mr. Laurie, who in the work of which we give the title in a note [a], has fully examined the use and abuse of grand juries, and has collected all the ancient learning, as well as all the recent information on the subject necessary to assist us, at least, in the determination of the question; and we proceed to lay before our readers the substance of his labors.

[a] An Inquiry into the Use and Abuse of Grand Juries; with Reference to their Adjudicating on Cases which have undergone previous Investigation before a Magistrate. By Peter Laurie, Esq., B. C. L. London: Smith, Elder, and Co.

Mr. Laurie has not been sparing in the undisguised expression of his condemnation, both of the principles and practice of the present system. He contends, that it is anomalous in theory, unnecessary in practice, an impediment to justice, and prejudicial to the interests of the public. He treats of these in their order; and certainly makes out a case, at all events, deserving of the most serious consideration. We shall not, within our limited space, be able to do more than present our readers with a brief analysis of the contents of the pamphlet, with a few extracts from its prominent parts.

Before proceeding to contrast the advantages of the *ordinary* trial by jury with the defects of *grand* juries, Mr. Laurie pronounces an eloquent eulogium on the former, and enquires what it is which binds this system to our affections?

"It is (he says) because the accused is equally protected with the accuser; because the trial is open and public; because the law is definite and explicit; because the evidence on either side is willingly received; because the prisoner has a right to challenge any one of the jury whom he may suspect of a bias against him; and, above all, because unanimity in his judges is indispensable before he can be convicted; would it could be added, 'because the prisoner, if unable, or unwilling to plead his own cause, is allowed the assistance of any legal adviser he might wish.'"

He then contrasts these features of excellence with the practice of grand juries.

"The characteristics of all our Courts," he observes, "are publicity, fairness, and unanimity; but the decisions of the grand jury are marked by secrecy, the absence of the accused, and a majority of votes. The grand jury are sworn 'well and truly to keep secret the King's counsel, their fellows', and their own;' the accused has no knowledge of them, and it would be of little avail if he had, since he could not object to his bitterest foe, who, in his absence, judges of his case: he cannot plead his own cause, cross-examine his accusers, nor offer the slightest evidence to disprove the crime alleged against him; and when his judges have heard the statements against him, the verdict of the smallest possible majority is as valid as a unanimous decision."

Mr. Laurie, however, fairly admits the importance of the institution of grand juries, as they existed in early times.

"It will be recollected (he says) that judges of assize and annual circuits were introduced by Magna Charta, prior to which, the administration of justice was intrusted to Justices in Eyre, *Justiciarii in Itinere*, who were appointed by the Parliament of Northampton, A. D. 1176, and directed to make a circuit round the kingdom, for the purpose of trying causes, once in every seven years, in order to relieve the people from the trouble and expense to which they had been hitherto subjected by the necessity of following the King's Court, in order to have their disputes decided."

"At this time, (he afterwards continues) the grand jury was of the utmost importance in preventing a person who was suspected of crime and had been imprisoned in consequence, being subjected to so severe a punishment as incarceration for years; as but for its interference, a man who was accused of some trivial felony might have been kept in custody for more than *six years*, before an inquiry could take place into the circumstances of his case. It should be also recollected, in those times, right and might were nearly synonimous terms; and, that the excellence of a giant's strength consisted rather in the results of its display, than in the consciousness of mere possession. Feudal tyranny was in its meridian, and the baron numbered his tenants amongst his chattels, to swell his importance at home, or as mere instruments to aid him in his tumultuary or predatory excursions. Impartial justice could hardly be expected when the robe of the judge was hastily thrown over the armour of the soldier,—the mailed hand of the fiery and arbitrary baron was ill fitted to poise the scales, especially when his own interests or feelings were inlisted in the cause; and it is to be feared, that where the claim of the vassal was weighed against the will of the lord, the sword was generally thrown in to turn the beam. A good reason also then existed for the oath of secresy. Police was to a certain extent unknown; concealment was easy, whilst detection was a slow and difficult process, and would have been wholly impracticable had the grand jury, by the publicity of their proceedings, given warning to the criminal to escape, either by flight, or by subornation of perjury, against which the imperfect system of jurisprudence then opposed but a slight barrier, and exposed the accusing party to his vengeance."

It seems, that whatever complaints may be made against the system, it cannot be subjected to the charge of want of despatch.

"At the September Sessions, 182—, the grand jury for Middlesex disposed of *six hundred bills in six days*. And it is not very long since, a clerk of the arraigns on the midland circuit, hinted to a learned judge, who was complaining of delay in the grand jury, that bills were sent in quite as fast as he could register them, as they had just found *sixteen bills in fifteen minutes!*"

The question now arises, is this mode of procedure of advantage to the country?

"It cannot be said, that a man is thereby saved from a long imprisonment, as it sits at the same time the Court above is ready to try the alleged offence in the usual way; in order to render it of any service in this respect, it

would be necessary to make it a perpetual Court, like the *Chambre du Conseil* of the French, the duties of which are equivalent to those of our grand jury, but which are called into action as soon as a case has been disposed of by the *Tribunal de Premier Instance*; and is, therefore, of material service in preventing an innocent man being kept in custody until he could be discharged by the *Cour d'Assises*, which sits only four times a year. The only advantage of any moment which our system presents, is the giving the prisoner an additional chance of escape; now without subscribing to the doctrine of Paley, that 'it is better that one innocent man should suffer, than ten guilty individuals escape,' it may be questioned whether the law be not sufficiently chary for any innocent man, and whether a diminution of the numerous chances of escape, which at present so often shelter the criminal, might not be attended with beneficial results."

"A grand jury, then, must either find a true bill, or ignore the indictment. Suppose the bill to be "found," the result amounts to this—the decision of the committing magistrate is *confirmed*, for that alone is the extent of their power; the public has gained nothing, and the prisoner has lost nothing by the investigation, as he is then tried in the usual way upon the merits of the case, just as if no such institution had existed. Why should the grand jury be better able to judge of the probabilities of the guilt or innocence of the prisoner than the magistrate?"

It may be said, that the opinions of twenty-three men will in all likelihood be more correct than that of one:—

"But that (observes Mr. Laurie) is on the supposition, that they have the same facilities for arriving at a conclusion, and it may be doubted, whether the opinion of one man, hearing the whole of the evidence, is not entitled to more consideration than those of two hundred and thirty men who decide on *ex parte* statement. In the great proportion of instances, (for the last thirty-four years, prior to which time police offices were not accessible to the public,) the preliminary investigation is conducted with open doors, subject to the scrutiny of the public, and the animadversions of a vigilant and unsparing press; evidence pro and con is required and carefully sifted; there is no hurry, no necessity for despatching cases lest the Court above should have no bills to go on with; nay, should it appear that any advantage would result from delaying the enquiry for a short time, the magistrate has the power of remanding the prisoner from time to time, and the case is thus seldom sent for trial unless there is every reasonable expectation that the accusation will be substantiated, and final conviction will be the result: unless such a feeling guides the decision of the magistrate, his fiat, which sends the prisoner to trial, is nothing short of a positive act of injustice, and a serious injury to society. It is also but reasonable to suppose, that a more accurate account of the transaction in question will be given by the prosecutor a day or two after the injury complained of has been inflicted, than after the lapse of weeks, and sometimes months; there is a greater facility in procuring the attendance of witnesses, whose public spirit might have evaporated too much to have impelled their attendance had any delay intervened; the inquiry is also local, and there is, therefore, less danger of the magistrate being imposed on by artful and profligate witnesses, and the account is received without being cramped and confined by the severer technicalities of law; and many facts of great importance may thus transpire which would be rejected by the Court, in limine, as 'no evidence;'—lastly, there is this great check upon witnesses at a police office, their depositions are all taken down in writing, afterwards read over, and deliberately signed by them.

"We now come (says Mr. Laurie) to the next branch of the power and duty of a grand jury, that of ignoring the indictment and discharging the prisoner; and, though we may admire the spirit of the maxim, in the abstract, of considering every man innocent till he is proved guilty, it must be admitted that many acquittals are not conclusive proofs of innocence. When the grand jury have endorsed upon the indictment 'not a true bill,' one of two events has taken place—an innocent, or a guilty man, has been discharged. Two of the alleged advantages of the system are, that an innocent man is saved the exposure consequent on a public trial, and that the time of the Court above is not unnecessarily occupied. The policy of both positions is very questionable; surely the investigation should conclude, as it commenced; the more public the acquittal, the more satisfactory is it to the prisoner and to society; the imputation thrown on his character by the accusation, and the subsequent committal, should be publicly removed; and, to an innocent man, a public trial, where the enquiry is more cautiously conducted by more responsible judges, ought to be desirable, for the verdict of a grand jury can amount only to the qualified negative of the Scottish tribunals, 'not proven;' but the decision of a petit jury declares him free from a shadow of moral debasement, and he leaves the bar with the implied, and often expressed opinion of the Court—an honest man. The second reason appears still more unfounded; where life or liberty, or that fair fame which alone can render life or liberty desirable, is in question, time is of little consequence. Time should wait upon justice, not justice upon time; for no speed is too great, no delay too long, to establish guilt or innocence."

"Nulla unquam de morte hominis cunctatio longa est."
JUV.

"The only remaining case then, in which we are made aware of the existence of the grand jury—the only case in which they can exercise any real, positive, independent power, is, *when a guilty man is discharged, who, had he been tried elsewhere in a different way, would have been convicted.* It is hardly necessary to add, that in this instance, it is worse than useless."

The work then proceeds to enumerate the impediments to justice; and, amongst others, we have the following statement:

"It is to be feared, that there is now a system in existence, and full operation, not indeed calculated like the blood-money, to affect the *lives* of individuals, but certainly to defeat the ends of justice, by means of what may be termed PERJURY-MONEY, and of which the grand jury has been converted into the main support. Now, if this evasion of justice can be effected at the public trial, with the depositions taken at the Police Office lying before the presiding Judge, accustomed to detect prevarication, to what lengths may it not extend with the facilities afforded by the constitution of the grand jury, who are deprived of this great check upon witnesses, and whose time does not allow sufficient delay for the purpose of unravelling improbabilities and reconciling apparent discrepancies?

"A gang, known as the 'swell mob,' have flourished for years with comparative impunity, which is to be attributed solely to their very considerable resources; and the following anecdote, though it may be considered rather irrelevant to the subject, will prove the correctness of the fact: one of the fraternity, named Page, had long been what is termed in the slang of the police, 'a first-rate cracksman,' and was one of three, who, in 1827, robbed the Glasgow Bank to a very large amount. A few months ago, he was arrested at Hammersmith by the solicitor of the bank (from whom the author had this information), accompanied by a police officer, and conveyed to Bow Street; on his way to the office, Page expressed his conviction that nothing could save him if he was tried, and stated to this gentleman, that if he would allow him to escape, he should receive *two thousand two hundred pounds*. As may be supposed, the offer was rejected, and he was lodged in prison. The next day he was examined, and remanded for farther evidence. The day after, he *escaped* from the cell attached to the office, about four o'clock in the afternoon!

"A perusal of the following facts will shew the manner in which the cases are worked, and the facility with which justice may be defeated before a grand jury—and the public are indebted to the skill and patience of Mr. Broughton, for the detection of this conspiracy. In the month of July, 1831, a man named William Jones was committed to Newgate for trial, on a charge of felony; the bill, however, was thrown out by the grand jury. From some circumstances which transpired afterwards, the two policemen, who were witnesses in the case, were taken up, and an investigation took place, when the following facts were elicited. The offence charged was stealing a watch. It appears from the information, that, a short time before the bill was preferred before the grand jury, Ann Harden, the prisoner's mother, applied to Gower and Rowland, the two policemen, to assist in 'getting her son's liberty,' and offered them various sums of money; the proposal was not entertained until sixty-one pounds were offered, when Gower said, 'they thought they could get the prisoner through;' the money was to be deposited in the hands of a mutual friend, until the prisoner was discharged, when it was to be divided in these proportions—Gower and Rowland were to have twenty-five pounds each, and Aylett, the principal witness, eleven pounds."

The details of the evidence are given, and fully bear out the preceding summary.

In conclusion, Mr. Laurie has adverted to the serious mischief to which the system may be perverted. He observes—

"It has been attempted to prove that the grand jury system affords encouragement to perjury for the sake of emolument: it must not be forgotten, that it can as easily be converted into an instrument for the gratification of malice and revenge. Every one is liable to a false accusation, and it is very easy for any unprincipled man to take the opportunity of the grand jury sitting to prefer a bill of indictment, without previously going before a magistrate; and, should the alleged offence be a felony, the party accused may be arrested by a Bench warrant, and confined for some days: where the indictment refers to a misdemeanour, the attempt will, of course, be frustrated, as bail can be put in. It has, however, been discovered, that captions have been so frequently made on a Saturday, evidently from improper motives, when, from the difficulty of procuring bail in sufficient time, the defendant is often detained in custody till Monday, that in Middlesex it is now the practice to refuse Bench warrants on a Saturday, where the offence is a misdemeanour, unless bail can be procured on that day. It may be said, that if this takes place, and the bill is thrown out by the grand jury, the complainant may be proceeded against, either civilly for false imprisonment, or criminally for perjury; but it should be recollected, that the class of persons most liable to this perjury are almost completely precluded from obtaining redress by the first method, by the expense of an action; in most cases, the remedy would be worse than the disease: and as to the second course, it is impossible to assign perjury on any proceedings before a grand jury, as the only persons who could prove the case are the jurymen, and they are prevented by their oath from disclosing what they may have heard. There is a case in the books of a grand juryman hearing a witness tender evidence in Court *diametrically opposite to that which he had given before the grand jury*. The gentleman gave information to the Court, and the witness was indicted for perjury, it being considered necessary in that case to waive the oath of secrecy for the ends of justice. It is to be feared, that this is the exception which proves the correctness of the above statement; at all events, the fact of the variation in the evidence is a strong confirmation of the argument."

We do not think it necessary to enter on

the next consideration taken up by Mr. Laurie; namely, the expense which would be saved to every county by the abolition of grand juries; for if they are beneficial, we think the expense ought not to be regarded. If, on the contrary, they are not beneficial, they ought to be discontinued, even were the saving of expense ever so inconsiderable. Of all reforms, by which money is to be saved, we think that the most mischievous would be that which denied justice because it would be dear, and promoted any kind of legal procedure by which it could be rendered cheap. As the duties of life (according to the admirable expression of Lord Brougham) are more than life—so the ends of justice are more important than the economy of its means.

SUPERIOR COURTS.

VICE CHANCELLOR'S COURT.

SPECIFIC PERFORMANCE.

A peer of the realm, having a pension from the crown, assigns it in payment of debts, and covenants that, in the event of that pension ceasing on the demise of the crown, and his getting a new one from the future King, he would assign that also for the same purpose; he does get such pension granted to him and his assigns: Held, that such pension is assignable.

This was a demurrer to the plaintiff's bill, which prayed a specific performance of a covenant made by the defendant under these circumstances:—the defendant had a pension from Geo. 4. and assigned it to the plaintiff for the payment of a debt of 8000*l.* and upwards. He added, by way of further security, a bond, and covenanted to assign for the same purpose any new pension that should be granted to him upon the demise of the crown. The defendant's pension ceased upon the death of Geo. 4, but it was renewed, or rather, a new pension was granted, by his present Majesty. That was the pension which the plaintiff now called on the defendant to assign to him in pursuance of his covenant. The defendant demurred to the bill, upon the grounds that the present pension was not a continuance of the former, but an entirely new grant from the crown; that, as this pension was granted for the purpose of maintaining the station and dignity of a peer of the realm, and as the crown and the public were mutually interested in supporting the peerage, the pension could not be made the subject of alteration or assignment. And lastly, that there was no evidence of a contract except the bond itself.

Mr. *Knight*, in support of the demurrer, argued these grounds; and added, that this Court did not give relief where a party had his remedy at law. This plaintiff had the latter remedy; for he took a warrant of attorney from the defendant, and might, at any time, enter up judgment upon it.

Mr. *Pepys*, *contra*, contended, that there was no law to prevent a person from assigning his pension for payment of his debts. There was nothing upon the face of this grant to shew for what purpose the pension was granted to the defendant. The best argument to prove that it was assignable, was, that it expressed to have been granted to the defendant *or his assigns*. Under these words, therefore, and by virtue of the defendant's covenant, the plaintiff now claimed the assignment of the pension. The dignity of a peer had nothing to do with the question.

The *Vice-Chancellor* was of opinion, that from the wording of the grant of this pension it was assignable, and he therefore overruled the demurrer.—*Manning* v. *Lord Audley*, Lincoln's Inn. March 21st, 1832. V. C.

COURT OF KING'S BENCH.

[Before the Four Judges.]

VARIANCE.—MISDIRECTION.—LACHES.—NEW TRIAL.

Where evidence applying to an issue not raised by the pleadings in a cause, but to which no objection is taken, has been admitted, and the judge has left the evidence to be considered by the jury: Held, no ground for setting aside the verdict and granting a new trial.

Dowling moved for a rule to shew cause why the verdict in this case should not be set aside and a new trial granted, on the ground of misdirection by the learned judge trying the cause. It was tried at the last assizes for the county of Sussex, before the Lord Chief Baron *Lyndhurst*, and a verdict found for the defendants. The plaintiff kept lodgings. The defendant, Jupp, was a publican, and the plaintiff in a plaint in the County Court of Sussex: the defendant, Barreiro, was a bailiff of that Court. It was an action of *trespass*, for entering the plaintiff's house and taking her furniture. The defendants pleaded separately. First, Jupp pleaded not guilty; secondly, that the plaintiff being indebted to him for certain causes of action arising within the jurisdiction of the County Court of the county of Sussex, he sued out a *justicies* directed to the sheriff of the county; that the sheriff directed his precept to the other defendant, Barreiro, commanding him to attach the plaintiff by her goods, so as to compel an appearance in the County Court; and that the alleged trespasses were committed in obeying the precept. He also pleaded leave and licence. The other defendant, Barreiro, pleaded the same pleas, and in addition justified, as bailiff, under the process, without alledging the existence of a debt due to the other defendant. The plaintiff replied, taking issue on the pleas of not guilty, protesting the *justicies*, and *de injuriâ* as to the rest. The defendants rejoined, taking issue on the replications *de injuriâ*. The plaintiff having proved the tres-

pass, the defendants proceeded to prove their justification. On producing the process, however, it was found to be issued against "Sarah" instead of "Elizabeth," which latter was the plaintiff's christian name. Evidence was then adduced to shew, that the plaintiff was as well known by the name of "Sarah" as by that of "Elizabeth." No objection was made to this evidence by the plaintiff. Lord *Lyndhurst* then left it to the jury to say, whether they believed that the plaintiff had been known as well by one name as the other. To this direction I object. I am aware, that no objection having been made at the trial to the admission of the evidence to shew that the plaintiff was as well known by the name of "Sarah" as that of "Elizabeth," I cannot now move on the ground of the improper admission of evidence; but I move on the ground of misdirection on the part of the Lord Chief Baron, in leaving for the consideration of the jury an issue, which was not raised by the pleadings. No objection was contained in the pleas, as to the variance in the process in the name of the plaintiff, or that she was as well known by the one name as the other. No issue was consequently raised as to the plaintiff being known by two names, and, consequently, the jury ought not to have been left to consider such an issue. The Lord Chief Baron was bound to examine the record, and to permit no issue but those raised on it to be considered by the jury, although evidence, which was inadmissible in point of law, had been put on his note. Such evidence was mere surplusage, which the jury ought to have been told to discard from their minds in finding their verdict. That it was inadmissible in point of law, is clear from the case of *Aquila Cole* v. *Hindson and three others*, 6 T. R. 234; in which it was held, that a plea of justification by an officer (to trespass for taking the goods of *A. B.*), that he took them under a *distringas* against *C. B.* (meaning the said *A. B.*), to compel an appearance, with an averment, that *A. B.* and *C. B.* are the same person, cannot be supposed. There, Lord *Kenyon* observed, "The defendants were not justified in seizing the goods of *Aquila Cole* under a *distringas* against *Richard Cole*; and the averment, in the plea, that *Aquila* and *Richard* are the same person, will not assist them, as they have not also averred, that the plaintiff was known as well by one name as by the other." This case was afterwards recognised in *Shadgett* v. *Clipson*, 8 East, 328; *Scandover* v. *Warne*, 2 Campb. 271; *Price* v. *Harwood*, 3 Campb. 108. In *Morgan* v. *Bridge and another*, 1 B. & Al. 647, where the sheriff having a writ against *G. B.*, arrested *M. B.*, who was the real debtor, and at the time of contracting the debt had represented himself as *G. B.*; Held, that the sheriff having been informed of these circumstances, while he had the real debtor in his custody, was not bound to detain him; and therefore that an action would not lie against him for an escape. These cases proving, that in the state of the proceedings at the time of the trial, such evidence was inadmissible, the learned Judge should not have left it for the consideration of the jury, and therefore misdirected them.

Lord *Tenderden*, C. J.—This is a question *strictissimi juris*. The objection to the evidence ought to have been taken at the time of the trial. Otherwise much time was lost in hearing evidence, which in point of fact was immaterial. At the time of the trial, it appears that both Judge and Counsel thought the evidence was admissible.

The other Judges concurred.

Rule refused.—*Shee* v. *Jupp and Barreiro*, E. T. April 17th, 1832. K. B. F. J.

KING'S BENCH.—PRACTICE COURT.

PONE.—VARIANCE.

A pone in case will not remove a cause in debt, although no other cause is pending between the parties.

Cresswell shewed cause against a rule for setting aside a *pone*, on the ground that it was in *case*, and the action in *debt*. There is but one action between the parties, and therefore no injury can arise. The variance is immaterial.

Manning, *contrà*, was stopped by the Court.

Littledale, J.—The *pone* appeared to remove an action in *case*, whereas there was no such action in existence, the only cause in existence between the parties being an action of *debt*.

Rule absolute, without costs.—*Eastman* v. *Taylor*, H. T. January 26th, 1832. K. B. P. C.

BANKRUPTCY COURT OF REVIEW.

VIVA VOCE EXAMINATION.

By the 38th section of the Bankrupt Court Act, power is given to the Judges to take the evidence, or any part of it, *viva voce* on oath. The Court acted for the first time under this new practice in bankruptcy on Tuesday last, the 17th of April, in the *matter of Palmer*, a commission that had been opened at Bath. The bankrupt presented a petition to this Court to have his commission superseded, on the ground that he had not committed an act of bankruptcy; and it will be seen by our report of this case, in the 77th Number, that the Court directed an examination *viva voce*. That examination commenced to-day, and was continued on the Wednesday following; the evidence was summed up by the counsel on Thursday. The superiority of this mode of proceeding compared to that by affidavit, appeared at a very early period of the proceeding, and justified the alteration of the practice in bankruptcy effected by the 38th section of the Bankrupt Act. We do not think it necessary to set forth the examinations; the witness on whose testimony upon the proceedings the act of bankruptcy rested, stated in his examination *viva voce* several circumstances which were not noticed in his deposition, but which he said he had stated to the persons who took down his deposition.

The *Chief Judge*, after consulting for five minutes with his brethren on the bench, delivered the unanimous opinion of the Court, that the commission had not been supported,

and could not stand; his Honour added, that the question simply was, whether the bankrupt left his house for the purpose of delaying his creditors; and after the examination which the witness had undergone, the Court was not satisfied of the affirmative of that fact.

It is well deserving consideration, whether, when any fact be disputed, such as trading, or act of bankruptcy, and that fact depends upon the testimony of witnesses, it is not desirable to dispense with affidavits and proceed at once to examine the witnesses *viva voce* before this Court; it would be a means of saving an immense expense, and, what is of still greater importance, facilitate the termination of the proceeding. Another case which has been in the course of hearing this week, that of the *matter of Springett*, wherein there were affidavits in chief in answer, reply, rejoinder, surrejoiner, rebutter, and surrebutter, fully justified this remark.

NOTES OF THE WEEK.

COMMISSION FOR ENQUIRY INTO THE POOR LAWS.

It will be recollected that the Lord Chancellor, some time ago, mentioned his desire of appointing commissioners to inquire into the Poor Laws, who would be satisfied to give their services gratuitously. The commissioners have since been appointed, and are the Bishops of London and Chester, Mr. Sturges Bourne, Mr. N. W. Senior, Mr. Gawler, Mr. Coulson, Mr. Irwill, and the Rev. Henry Bishop. They are to make their report within one year from the 17th of March last. Mr. George Taylor is appointed secretary.

THE HEALTH OF THE LORD CHANCELLOR.

On Monday the Lord Chancellor took an opportunity of stating that he had not been unwell, as has been reported. We sincerely rejoice at this assurance.

CHANGES IN THE EQUITY COURTS AND OFFICES.

In another part of this number we have given from a contemporary the substance of a proposed bill, understood to be sanctioned by the Board of eminent Equity Counsel commissioned by the Lord Chancellor to frame a proper bill. It is said that the bill has been sent to the Six Clerks' Office; but after some enquiry, we have not been able to ascertain the accuracy of this statement, and on good authority are inclined to believe that no material alterations will be effected during the present session of Parliament. However, we have deemed it proper to put our readers in possession of the supposed alterations, which are sufficiently sweeping, and well deserve attention. It will be observed, that almost all the contemplated changes have from time to time been stated and discussed in our pages.

UNITED LAW CLERKS' SOCIETY.

We have received a copy of the Rules and Bye-Laws of the United Law Clerks' Society held at the Southampton Coffee-House, Southampton Buildings; and which appear to have been enrolled according to the provisions of the Benefit Society Act. We understand several donations have been made by benevolent members of the profession. We cordially wish the Society success, and shall take an early opportunity to notice the plan on which it is intended to be conducted.

ANSWERS TO QUERIES.

LAW OF PROPERTY AND CONVEYANCING.

DEVISE.—ENTAIL. VOL. 3, P. 395.

The first son takes an estate tail, there being no intermediate estate between his estate for life and the remainder to his sons in tail. See Preston on Abs. vol. 2. p. 166. Shep. Touch. vol. 2. p. 444. Black. Com. vol. 2. ch. 11. R. M.

DEVISE.—IMPLICATION. VOL. 3, P. 395.

If an estate is devised to a stranger after the wife's death, the devise raises no implication in favor of the wife; for it may descend to the heir during the life of the wife. Cro. Jac. 75. Otherwise, if the devise be to the *heir at law* after the wife's death. 1 Ventris, 376.

R. M.

MORTGAGE BOND.—BANKRUPTCY. VOL. 3, P. 364.

The creditor holding the mortgage bond, may have it sold, as well as the estate mortgaged, and prove for the deficiency, if any. *Ex parte Hillier*, Cooke B. L. 138. But I am not aware of any clause in the bankrupt act, by which, as in the case of an insolvent testator, he is entitled to rank as a specialty creditor, and to be paid in full. J. B. S.

RENT.—BOND. VOL. 3, P. 348, *antè*.

A mortgagee may distrain after notice. 2

Ves. & Bea. 252. 9 Barn. & Cres. 245. 4 Russ. 64. A bond binds the heir, but not the land. At law, I apprehend, the bond creditor has no remedy until the heir becomes adult, and then only by an action upon the bond; nor can he distrain for rent. If *A. B.* were a trader, his real estate is equitable assets, under 47 Geo. 3. c. 74; and 1 & 2 W. 4. c. 47. 2 Jac. & Walk. 287. 2 Sim. & Stu. 451.

A. E. I.

COMMON LAW.

SIMONY. VOL. 3, P. 396.

I beg to inform your querist, that the right of advowson is in fact a lay, and not an ecclesiastical right: it is like the right of a lay impropriator to tithes, and may be made the subject of devise and sale, without infringing the laws of simony, or incurring any offence, either spiritual or temporal. The only restriction is, that it cannot be fully enjoyed by the proprietor, unless he happen to be in holy orders.

H. B. A.

ON PAROCHIAL REGISTRY AND FEES. VOL. 3, P. 358.

Your correspondent T. has, I consider, attacked me in an unprofessional manner. He indirectly states my answer to be inaccurate, without adducing any proof whatever of its being so. The answer alluded to was not merely conjecture, but founded on the statement of an eminent country practitioner. The cases cited by your correspondent, instead of altering, tend to confirm me in the correctness of my observation. By the act which he cites, *viz.* 52 Geo. 3. c. 146. § 15, it appears that some fees payable to the clergy for copies of registers, had been settled by some law, or what necessity would there otherwise have been for the following clause? "*but the sum, and the power of recovering the same, shall remain as before this act.*"

Does your correspondent suppose, that there are no acts of parliament in existence but what have come under his inspection? or that the ones cited by him are the only two on the subject that have ever been framed?

H. B. A.

QUERIES.

COMMON LAW.

BANKRUPTCY.—COGNOVIT.

By the 7th section of 1 W. 4. c. 7, after reciting the 108th sect. of the bankrupt act, 6 Geo. 4. c. 16, and that by reason of the provision therein mentioned, plaintiffs have been, and may be, deterred from accepting a *cognovit actionem*, with stay of execution, whereby the expense of further proceedings in such action might have been, and may be saved or diminished; for remedy thereof, it is enacted, "That no judgment signed, or execution issued, after the passing of this act, on a *cognovit actionem*, signed after declaration filed or delivered, or judgment by default, confession, or *nihil dicit*, according to the practice of the Court, in any action commenced adversely, and not by collusion for the purpose of fraudulent preference, shall be deemed or taken within the said provision of the said recited act." Does this clause include judgments upon warrants of attorney? If not, to what judgments does it extend, or afford protection, other than upon *cognovits* signed after declaration filed or delivered?

J. W. L.

PRACTICE.

EXECUTION.—COSTS.

Is a defendant, charged in execution on a *ca. sa.*, entitled to his discharge, on payment of the debt and costs, to the time of signing judgment? or is he also obliged to pay the costs of the *ca. sa.*, officer's fee, and sheriff's poundage? See 43 Geo. 3. c. 46. § 5.; and 8th edit. of Tidd, p. 1035-6, and cases there mentioned.

ENQUIRER.

NEW RULES.—INDORSEMENT OF COSTS.

One of the new orders requires, that upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, &c., and that upon payment thereof, within four days, to the plaintiff, or his attorney, further proceedings will be stayed.

I now put the case, that I sue both the drawer and the acceptor of the same bill of exchange; the process must be several. Hitherto the acceptor of a dishonored bill of exchange has been considered liable to the costs of actions against the other parties, and not entitled to have proceedings stayed, till he had paid the debt and the costs, as well against himself as against the other parties. By the above rule, a plaintiff appears compelled to settle with the acceptor, on payment of debt and his own costs only; he being restricted to indorse only the costs of *such writ or process*. This effect of the rule was probably never contemplated; and it is of consequence to know how a plaintiff is situated in this case.

O.

MISCELLANEA.

CROKE'S REPORTS.

"Rhyme," says Hudibras, "is the rudder which the verse must steer." Accordingly, the ordinary pronunciation of this name is here sacrificed to that necessity. The name is usually pronounced as if it were spelt "*Crooke.*" The celebrated "*Jack Lee,*" as he was familiarly called by the Bar, (a contemporary of Dunning,) constantly violated this custom, and pronounced the name "*Croke,*" which procured him the nick-name of "*frog-Lee.*"

Conveyancer's Guide.

The Legal Observer.

VOL. IV. SATURDAY, MAY 12, 1832. No. LXXXII.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

LETTERS TO THE LORD CHANCELLOR.

LETTER VIII.

ON THE PRESENT STATE AND PROSPECTS OF LAW REFORM.

MY LORD,

IT is now some time since I had the honour of addressing your Lordship through the medium of these columns. I had then occasion [a] to call your attention to the Bill for the establishment of the New Bankruptcy Court, of which your Lordship was the political father. I have no intention to renew that subject; neither have I been tempted to rejoin to the "Replies" which that letter called forth, as it still, in all its great points, remains unanswered. With this passing allusion, then, I leave the Bankruptcy Court to its fate: all feeling of hostility to it has long since passed away. I would rather say a word in its favor, if eulogy would not necessarily look like mockery.

I pass, my Lord, to a subject of far greater importance: a subject which we know is nearest to your Lordship's heart. I mean, the reform in our laws; the interests of which your Lordship, I firmly believe, for so you have often stated, took office to promote, and which, the country has a right to expect, will be attended to under your administration. Be assured, my Lord, you owe a great part of the love, respect, and reverence of your country, which you have so justly obtained, to the confident feeling that you will not leave the law as you found it; that a true reform will be effected; and that the real abuses will be remedied. This being the general feeling, it will be proper to inquire into the actual advance which law reform has made since your Lordship has held the seals, with your sanction and instrumentality. Permit me, then, to inquire, first, what has been done, and next, what is still to be done. The first part of the enquiry is easily made; the last will be found more serious, and not so easily answered.

Encumbered as your Lordship was, in the last session of parliament, by the novelty of your office, and by the many calls on your attention, no one could expect that you could do more than you really did; although little was actually effected, a great deal was proposed; and it was to the present sessions that the public and the profession looked for the fulfilment of a part that had been promised. Let us, then, see what has been done in parliament by your Lordship, or the government with which you act, in the three months of the sessions from which so much was expected.

Thirty acts have been passed; but, with what can hardly be called an exception [b], they consist of that kind of enactment which serve the King's printer and the clerks of the Houses of Parliament—but few other persons. Indeed, when I look upon the increasing list of bills which should be passed, which have stood over from session to session, and which appear in the order-paper but to remind us of the negligence of our legislators, I confess my heart grows faint within me, and I begin to despair of any efficient reform in that part of our institutions which is assuredly the most in need of it.

Let me beg of your Lordship to look back to the time when your Lordship took office,

[a] See 2 L. O. p. 385.—*Ed.*

[b] The 2 W. 4. c. 4. "An Act for more effectually preventing Embezzlements by Persons employed in the Public Service of His Majesty," is probably alluded to. *Ed.*

and see what has been done. One only act has been passed in pursuance of the great system of law reform proposed by your Lordship—the Bankrupt Court Act—a very questionable measure, as every one must admit. This is all that *has* been done.

I now go to the other part of the enquiry which I have taken the liberty to propose—What is there *yet* to be done? And as to this; I sincerely hope to see no more notices of motions; no more abortive bills, until the present list is disposed of. The task already set must be got through before more is attempted; for let us look at the list.—First come the bills proposed by your Lordship for Lunacy and Chancery Reform: and here I cannot but express my disappointment. Who can remember the time when your Lordship roused all your mighty energies in the cause of law reform: when you bestrode the ministry of the day, and thundered forth your demands, and would take no denial; who can remember the just and universal reputation which you then acquired, and the cheerful answer which the country made to your call; who can remember this, without also recollecting the thoughts which rose in his breast.—"Oh! that this man were in office; that he had the power to execute that which he so triumphantly enforces; that his hands were clothed with authority, and his place among the rulers of the land; then should we see this golden dream realized; then should we see these sounding words assume a substantial form." These, I confess, were my feelings; nor were they, I believe, peculiar to myself. Have I not, then, some cause for disappointment? I venture now, my Lord, to call for the fulfilment of those promises, given to us by the popular orator of the day, and solemnly reiterated by the Lord Chancellor in the House of Lords.

The Lunacy and Chancery Reform Bills, I know not now where to find. I know not what changes they have gone through;—"the battles, sieges, dangers they have passed." But there is another grievance of a different sort, nearly equally pressing. The bills brought in by Mr. Campbell, are actually in the House of Commons, and there they have been for a year and a half; and there they may remain for ten more years, unless government choose to take them up. It is said, that some treasury clerk has discovered that the passing of the Fine and Recovery Bill will injure the revenue to the extent of some 10,000*l.* a year, and that this is the secret of the delay. If so, at least, let the others be passed; let the true reason be given; let Lord Althorp "own the soft impeachment;" but do not let the country be trifled with, as it has been with respect to these bills. Your Lordship will readily remember, that they have proceeded from commissioners whom you called into existence; let them then receive your support.

The bills of the common law commissioners have hardly received a better fate. By the exertions of Lord Tenterden, some of them were passed in the last sessions; but the Arbitration Bill still hangs suspended, and the Common Law Process Bill does not move much faster.

It was hoped also, that the Usury Laws, and the state of the Criminal Law, would have received your Lordship's attention; but they have been left, alas! to Mr. Mackinnon, and Mr. Ewart,—neither of them, I fear, pilots of sufficient experience to carry them safe into harbour.

"O nimium cœlo et pelago confise sereno,
"Nudus in ignotâ, Palinure, jacebis arena."

I can barely name some of the other bills, all aiming at a reform in the laws which are now waiting in the House of Commons. The Coroners Bill; the Bankrupt Act Amendment Bill; the Witnesses in Equity Bill; the Statutes of Frauds Amendment Bill; the Attestations of Instruments Bill; the Registration of Births Bill; the Bill to Limit the Privileges of Members of Parliament as to Arrest; the Bill for the Better Examination in Ireland of Witnesses in English Equity Suits; and many others, which relate purely to the remedy of well known defects in the present system, and the propriety of which can hardly admit of a doubt; yet are they all suffered to languish, and many of them, I fear, to fall through, for want of efficient support.

It is with no unfriendly feeling, my Lord, that I call on you to show that you are in earnest on the subject, and to endeavour to clear off some of these arrears, that room may be made for the other measures which the forthcoming reports of the law commissioners will render necessary. It is due to your Lordship's character; it is due to your former declarations; it is due to your first speeches when in office. I shall not undertake the ungrateful task of proving this, for it is not necessary; as I feel satisfied that you will soon remove the doubt which now rests on your Lordship's character on this account. I have the honor to be, my Lord, your Lordship's most obedient servant,

A Barrister.

Lincoln's Inn, May 5, 1832.

P.S.—(*May* 9.) The above letter was written

and printed before the recent circumstances relating to the ministry had taken place. As the Lord Chancellor may still remain in office, and as, even if he resign, it may not be without service, I do not see any reason for altering it.

NEW BILLS IN PARLIAMENT.

ANALYSIS OF A BILL FOR THE BETTER EXAMINATION OF WITNESSES IN IRELAND IN SUITS IN THE COURTS OF EQUITY IN ENGLAND, AND FOR EMPOWERING THE COURTS OF LAW AND EQUITY IN ENGLAND TO GRANT COMMISSIONS FOR TAKING AFFIDAVITS IN IRELAND.

RECITING, That it is expedient that the Courts of Chancery and Exchequer in England should be respectively empowered to appoint fit persons in Ireland to be standing Commissioners for the examination of witnesses, and taking answers and pleas and demurrers in suits in equity, depending in such Courts respectively, and that the power of granting commissions for taking affidavits, which is now vested in the Courts of Law and Equity in England, shall be enlarged, by enabling such Courts respectively to grant commissions for the same purpose in Ireland, analogous to an act of the fifty-fifth year of the reign of his Majesty King George the Third, intituled, "An Act for the better Examination of Witnesses in the Courts of Equity in Ireland, and for empowering the Courts of Law and Equity in Ireland to grant Commissions for taking Affidavits in all parts of Great Britain."

It is therefore proposed to be enacted, 1. That from and after the *passing of this act*, it shall be lawful for the Lord High Chancellor of England, or other person or persons having the custody of the great seal of England for the time being, to appoint, and they are hereby respectively authorized and empowered to appoint one or more fit and proper person and persons to swear and examine in Ireland witnesses who shall be produced before such person or persons in Ireland to be sworn and examined in suits depending in the Court of Chancery in England as a Court of Equity, and to take in Ireland answers, pleas and demurrers of defendants in such suits and affidavits, of parties and others in such suits, in such and the same manner as the Masters in Ordinary of the said Court of Chancery and the Examiners of the said Court may swear and examine such witnesses, and as the said Masters and Examiners of the said Court may take such answers, pleas and demurrers, and such affidavits, according to the practice of the said Court.

2. That it shall be in like manner lawful, from and after the *passing of this act*, for the Lord Treasurer, Chancellor, and Barons of his Majesty's Court of Exchequer in England for the time being, or any two or more of them, whereof the Lord Treasurer, Chancellor, or Lord Chief Baron for the time being, shall be one, to appoint, and they are hereby respectively authorized and empowered to appoint one or more fit and proper person and persons to swear and examine in Ireland witnesses who shall be produced before such person or persons in Ireland to be sworn and examined as witnesses in suits depending in the said Court of Exchequer in England as a Court of Equity, and to take in Ireland answers, pleas and demurrers of defendants in such suits, and to take affidavits of parties and others in suits depending, and to hold to bail in the said Court of Exchequer of England, as a Court of Law or of Equity, in such and the same manner as the Barons and Officers of the said Court may swear and may examine such witnesses, and as the said Barons and Officers may take such answers, pleas and demurrers, and such affidavits, according to the practice of the said Court.

3. That the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal of England, the Master of the Rolls, and the Judges of the Courts of King's Bench and Common Pleas, and the Barons of the Exchequer, or *five* or more of them, of whom the Lord High Chancellor or Lord Keeper for the time being, the Chief Justice of the King's Bench, the Chief Justice of the Common Pleas, or the Chief Baron of the Exchequer, shall be one, shall from time to time order and direct the fees to be taken by the several Commissioners to be appointed under the authority of this act, exclusive of travelling charges and expenses when any such Commissioner shall be required to travel from his place of abode for any of the purposes of this act; and shall also from time to time order and direct the rates to be taken for such travelling charges and expenses.

4. That the person or persons so to be appointed by the Courts of Chancery and Exchequer in England respectively shall hold such offices during the pleasure of the Court so appointing them, and shall be deemed and taken to be officers of the said Court, and shall be called Extraordinary Commissioners thereof for the purposes aforesaid; and that such Extraordinary Commissioners respectively shall have full power and authority to summon persons to attend them respectively at such times and places as they shall respectively appoint, to be sworn and examined as witnesses in suits depending in the Courts so appointing them, in the same manner as Commissioners appointed by special commission by such Courts respectively may examine such witnesses.

5. That every person who shall be appointed an Extraordinary Commissioner under the authority of this act, shall previous to entering upon the duties of such office take the oath of office hereinafter mentioned and prescribed; which oath shall be taken by every such officer as shall be appointed by the Court of Chancery of England to such duty in Ireland, before one of the Masters in Ordinary of the Court of Chancery of Ireland, or other person in Ireland appointed by the Court of Chancery of

Ireland to take affidavits in the said Court, who are hereby respectively empowered and required to administer the same; which oath shall in like manner be taken by every such officer as shall be appointed by the Court of Exchequer of England to such duty in Ireland, before one of the Barons of the Court of Exchequer of Ireland, or other person in Ireland appointed by the Court of Exchequer of Ireland to take affidavits in the said Court, who are hereby respectively empowered and required to administer the same; and every oath so to be taken shall be, immediately after the same hath been taken, transmitted by the officer so taking the same, to the proper officer for filing affidavits in the Court by which such person has been appointed such Extraordinary Commissioner, who shall, upon receipt thereof, file and preserve the same in such manner as other affidavits made in the said Court are filed and preserved in his office.

6. The form of the oath is set forth.

7. That the Courts of Chancery and Exchequer of England respectively shall from time to time make such general or particular orders touching the conduct of such their officers, and touching the examination of such witnesses, and the taking of such answers, pleas and demurrers, and such affidavits, in their said Courts respectively, and touching the transmitting the same to the said Courts respectively, as to the said respective Courts shall from time to time seem fit and proper.

8. That every person who shall in Ireland be sworn or affirm and examined as a witness, or sworn or affirmed to the truth of any answer, plea or affidavit, before any officer or officers who shall be appointed under the authority of this act for taking the same, and who shall in his or her answer, plea or affidavit, wilfully swear or affirm falsely, shall be deemed guilty of *perjury*, and shall incur and be liable to the same pains and penalties as if such person had wilfully sworn or affirmed falsely in the open Court wherein the suit in such oath or affirmation was taken then depended.

9. That the Courts of King's Bench and Common Pleas in England respectively shall, from and after the *passing of this act*, have such and the same powers of granting commissions for taking affidavits in Ireland as the Courts of King's Bench and Common Pleas in England respectively now have in England; and all and every person and persons wilfully swearing or affirming falsely in any affidavit or affirmation to be made before any person who shall be empowered to take affidavits under the authority aforesaid, shall be deemed guilty of *perjury*, and shall incur and be liable to the same pains and penalties as if such person had wilfully sworn or affirmed falsely in the open Court wherein the suit in which such affidavit was so taken at such time depended.

CRIMINAL TRIALS.

Under the title of "Remarkable Trials," we have from time to time, almost from the commencement of the Work, introduced to the notice of our readers a series of cases, selected from the annals of crime in this and other countries. Besides these trials, which are of past times, we have reported all those of importance which have occurred since the publication of the Monthly Record. In both classes we have been able to form a collection, not only somewhat extensive, but (we have reason to believe) interesting to our subscribers.

We observe that the Society for the Diffusion of Useful Knowledge has considered the publication of Criminal Trials so desirable as to include them in their "Library of *Entertaining* Knowledge;" and the first part of a volume of this nature has just appeared. The introduction to this new department of the Society's works is written by Mr. Jardine; and we need not say that we approve of all that he has said in favor of a plan which we long ago adopted, and have acted upon. Mr. Jardine observes that it has been erroneously supposed that Collections of State Trials are valuable only to lawyers; and he maintains that their importance and interest equally extend to the general reader. In conducting this journal we have also endeavoured, without sacrificing any of its essential features as a professional work, to attract all those who are interested in the administration of justice, as well as the reform of the laws. We have also considered it our duty to introduce such interesting matter, of past and present times, relating to jurisprudence, as might encourage the student at the outset of his labors; and to our professional brethren we have also aspired to afford some occasional relief by the variety of our pages.

We agree, therefore, with Mr. Jardine, in the estimate he makes of the importance of this class of trials.

"The interest (he says) which they excite is universal, being founded upon the same principle which brings persons of both sexes, old and young, and belonging to all classes of society, into our courts of justice to witness the trials of criminals; that principle is to be found in the feeling of reality which prevails on such occasions, and the consciousness that the life or liberty of a fellow-creature is at stake, and the facts upon which his fate depends are actually weighed before our eyes. Hence it is that no procession or solemn show, no theatrical representation, nor the most popular preacher, ever attracted greater crowds than the trials of Hatfield or Bellingham, or, in these later years, of the Cato-street conspirators; and no orator or actor ever addressed an audience of more breathless attention, than

that which witnessed the proceedings in those memorable cases. Next in point of attraction to actual presence on such occasions, is the perusal of the written report of what has taken place; and the eagerness with which this report is sought is scarcely less remarkable than the persevering patience and unwearied attention of those favoured few who have endured the heat and suffocation of the day within the four walls of the Court.

"This interest is not by any means confined to judicial proceedings arising out of the passing incidents of the day; a similar feeling, though less intense in degree, is produced by the perusal of the trials of former times. The truth is, that they give life and reality, and what may be termed dramatic effect, to the scenes, events, and characters of history; the reader fancies himself a step nearer to the actors on the stage; his attention is strongly roused, and a more vivid impression of the facts recited is left on the memory than by the regular narrative of the historian. They exhibit also a singular variety of character, under circumstances of difficulty and danger. In the results of many of them were involved, not only the fate of the individuals immediately concerned, but the liberties of the whole nation; and they display, in the most impressive form, the energies of great minds powerfully excited by the consciousness of being placed in such momentous extremities. Some of the mortal struggles here recorded present examples of indignant and uncompromising defiance of oppression, with a sacrifice of all considerations of personal safety; in other cases, we meet with instances of affecting and impassioned eloquence; and in others again, of calm, dignified, and persuasive reasoning. We read all of these with something like a romantic interest; the sense of reality never leaves us, and we continually feel that we are looking upon a picture of real life, and not upon a work of the imagination. In this point of view, and with reference to the interest produced by them, Collections of Trials may perhaps be turned to good account in the study of history; for all who have had experience in the business of education will admit, that one of the greatest difficulties in all branches of learning is overcome, when the attention of the student is once thoroughly excited, and his interest powerfully awakened towards the subject before him."

After enlarging on various topics, to shew the usefulness of Reports of State Trials,—as furnishing materials for history,—the means of judging of the accuracy of historical works,—the character of the times, and progressive improvements in the criminal law—Mr. Jardine has contrasted the mode of trials in ancient times for state offences, when torture was inflicted, with the improved procedure in the present age.

"In the boasted age of Elizabeth (he says) the practice was to arrest the suspected person, and to keep him in strict imprisonment till it suited the purposes of the crown to try him. During this interval, (which was quite without limit in practice, however illegal, there being instances of imprisonment for many years without trial,) the prisoner was left to ruminate upon his misfortune in solitude, no friend or adviser being admitted to him; his gaoler, perhaps, or some expert underling of state, was occasionally introduced to examine him,—to extort confessions from him; or, failing in this object, to do what Tacitus describes as the height of imperial tyranny at Rome, *suspiria subscribere*,—to write down and register the sighs and groans of the captive, for the purpose of making them the subject of criminal charges. Coming to his trial with his powers both of body and mind wasted by confinement, he was literally brought out to "fight without a weapon." He heard the charge against him for the first time, when the indictment was read upon his arraignment; he was left to puzzle out his way to the meaning of the charge, involved, as it was, in technical jargon, and was compelled to plead instantly to it. If he denied it, evidence was produced against him, consisting of written, or even verbal accounts of the examinations of persons, not brought into court, not cross-examined by him, nor confronted with him in any way; sometimes convicted traitors waiting for execution; sometimes men charged with the same offence which was imputed to him, and hoping for, and even promised pardon for themselves, if they succeeded in fixing guilt upon him. He was not allowed to call witnesses to prove his innocence of the charge, or to impeach the testimony of the witnesses for the Crown; counsel were not to assist him in making his defence, and, during the whole proceeding, the Judges and King's Counsel were accustomed to display their ingenuity by perplexing the prisoner with questions, and endeavouring to extract his condemnation from his own mouth. If the jury found him guilty, his life and property were in the King's hands; and the old observation which has been applied to princes may with equal justice be applied to persons convicted of state offences in ancient times, namely, 'that the interval between their prisons and their graves was usually but a short one;' if, on the other hand, he was acquitted, the jury were reprimanded, or even punished, and the prisoner was sent back to confinement till the materials for a new charge were compounded, or till it pleased the caprice of government to discharge him."

Such was the practice—if not the law—in the time of Elizabeth. Mr. Jardine then proceeds to place in opposition the modern course of proceeding.

"A person imprisoned on a charge of treason is entitled immediately to a copy of the warrant of commitment, which the gaoler is bound to deliver to him under a very heavy penalty; friends and advisers are admitted to consult with him at all reasonable times; if upon the warrant of his commitment or otherwise, he has reason to believe, or is advised that his imprisonment is illegal, or that he is entitled

to bail, he may demand to be brought personally before some court of superior jurisdiction; and after being heard publicly and openly, he will be either bailed, remanded, or discharged; he must be brought to trial within a reasonable time, and if not indicted in the course of the next term or sessions after his commitment, he is entitled to be bailed; and if not indicted and tried at the second term or sessions, he may be discharged. There must be an interval of fifteen days between his arraignment and trial. A copy of the indictment, together with a list of the witnesses to appear against him, and also of the jury by whom he is to be tried, with a full description of each person, in order that he may know how to direct his challenges, must be delivered to him ten days at least before his trial; counsel are assigned to him by the court upon his own nomination, who are permitted to assist him in every part of the trial, by examining witnesses and addressing the jury in his behalf; there must be two witnesses to support every article of the treason charged against him; all the evidence is given in open court, and the prisoner or his counsel are allowed to cross-examine the witnesses for the prosecution; no questions are asked of the prisoner during the whole of the proceeding as to the facts of the case; he may call as many witnesses as he pleases, who are examined upon oath, and he has the same means of compelling their attendance as the Crown; on a verdict of acquittal, he is instantly discharged, and the jury are never questioned for their conduct."

Speaking of the trial by jury in very remote periods, Mr. Jardine remarks that there is great reason to believe that originally no evidence, as we now understand the term, was produced in criminal cases.

"The inquest (he says), which we now call the grand jury, presented an accusation against a criminal; if the accused elected to be tried by the country, instead of claiming a trial by ordeal, or by battle, the second inquest, since called the petty jury, were summoned from the neighbourhood where the offence was supposed to have been committed, and decided upon the guilt or innocence of the prisoner by their own personal knowledge of the facts only, and without hearing any evidence.[a] The jurors were sworn to *speak the truth*,[b] and must therefore, of course, speak from their own knowledge, and not from the testimony of others; so that in very early times, the trial by jury was, to all intents and purposes, a trial by witnesses;[c] and as such, was beyond all doubt an extremely valuable institution, when the state of the population was such that persons residing in the immediate neighbourhood where a crime had been committed, might reasonably be presumed to have a personal knowledge on the subject. But when the condition of society became so changed that, instead of having personal knowledge of a fact occurring in their neighbourhood, the jury were, in truth, wholly ignorant of it, or only knew it from hearsay, the old proceeding became a pernicious piece of mummery, productive of infinite oppression and tyranny, and at length gave way to the practice of producing evidence of facts to inform the consciences of the jury, who gradually lost the character of witnesses, and became judges of the truth of the accusation preferred by the grand jury."

Although we approve of the plan, we cannot acknowledge that the two cases which have been selected for the first publication are well chosen. It may be true that the trials of Sir N. Throckmorton and the Duke of Norfolk are highly interesting to some readers; but we question whether they will prove equally so to the numerous class for which the publication is designed. If, however, one of these long trials had been deemed essential for the dignity of the work, it would have been better to defer the other, and introduce in its stead one or two of a different class. Such a course would have been more consistent with a work professedly intended to entertain the general reader.

PRACTICAL POINTS OF GENERAL INTEREST.

No. XXV.

WIFE'S CHOSES IN ACTION.

A husband survived his wife, and then died, and administration was taken out to his effects; and the question was, whether the administrator of the husband could recover the wife's *choses in action* without first taking out administration to the wife. This was argued in a late case, when it was contended that this could be done, and a declaration was filed to recover such *choses in action*; and to this there was a general demurrer.

The Court, without hearing *Campbell* in support of the demurrer, called upon *White, contrà*. The ground of demurrer is, that the plaintiff, not being administrator to the wife, cannot have a *scire facias* to enforce payment of the 125*l.* which became due by virtue of the bond in her lifetime. The point which this demurrer was intended to raise is, that the husband's administrator is not entitled to sue in this case, inasmuch as the 125*l.* was not reduced into possession during the wife's lifetime. But this is contrary to the rule, as stated by Mr. Butler in his note on Coke upon Little-

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[a] Reeves's History of the Law, vol. 2, p. 268 and 495; vol. 4, p. 494 and 595.

[b] "*Verum dicere*," and hence *veredictum*, the verdict.

[c] This mode of trial, and the distinction between it, and the method of trial by the civil law, is alluded to by Throckmorton in his trial.

son, 351. He there says, "By a series of cases, it is now settled that the representative of the husband is entitled as much to this species of his wife's property" (choses in action not reduced into possession during her life), "as to any other; that the right of administration follows the right of the estate, and ought, in case of the husband's death after the wife, to be granted to the next of kin of the husband;" and to this latter point he cites Mr. Hargrave's Law Tracts, p. 475, n. where it is argued that the right of administering follows the right to the estate. In *Bacon* v. *Bryant*, 11 Vin. Abr. Ex. (K.) pl. 25, it was held, that if a son dies intestate, or a wife, the husband of such wife, and the father of such son, are entitled to the whole of their personal estate, and to administration; and if such husband or father dies before administration granted to them, yet the personal estate of their intestate was an interest vested in them, and shall be part of their personal estate, and administration shall be granted to the representative of such husband or father. *Squib* v. *Wyn*, 1 P. Wms. 378; *Cart* v. *Rees*, 1 P. Wms. 381; and *Elliot* v. *Collier*, 1 Wils. 168, are authorities to shew that under such circumstances, the right to the wife's choses in action is considered to have vested in the husband, as next of kin to her (according to the stat. 29. Car. 2. c. 3. § 25.), although he may not have taken out administration; and to be transmissible, notwithstanding, to his executor or administrator. And it appears from *Cart* v. *Rees*, and the expressions of Lord *Hardwicke*, in *Elliot* v. *Collier*, that if in such a case any other person than the husband's representative takes out administration to the wife, he does so as trustee for such representative.

Parke, J.—In 1 Roper's Law of Husband and Wife, p. 205, n., 2d edit., it is said, that the practice of Doctors' Commons, on this point, is contrary to the opinion given by Mr. Hargrave, in his Law Tracts.

Lord *Tenderden*, C.J.—The question is, not who is actually entitled to the property, but who has the right to sue for it? Bearing that distinction in mind, it will be found that all the cases agree. In *Squib* v. *Wyn*, the administratrix of the husband claimed choses in action of the wife whom he had survived; but it appears that administration was taken out not only to the husband, but to the wife, *de bonis non*, the husband himself having previously administered in part; so that in any view of the case, his administratrix was entitled. And in *Cart* v. *Rees*, cited at the close of Lord *Eldon*'s judgment in the same case, it appears that the wife having died possessed of choses in action, and the husband having also died without taking out administration to her, the wife's next of kin administered to her, and in so doing, became the husband's representative. And where it is laid down that the right of administration follows the right to the property, when such right is vested in the husband, that must be understood to mean administration to the wife. In the present case such administration had not been taken out, and the plaintiff therefore had no claim. It stands on well known principles, that if the husband, surviving the wife, does not in his life-time reduce her choses in action into possession, then, although in equity those claiming under him are entitled to them, they must be recovered, not by his representatives, but the wife's; and they will take the property as trustees for the representatives of the husband.

Littledale, J.—The choses in action of the deceased wife can only be claimed by a person administering to her effects; at all events the plaintiff, by his own shewing, has no title.

Parke, J.—The cases cited as to the right of the husband and his representative apply only to the beneficial interest; and Mr. Butler, in the note referred to, pronounces on the right of administration, but not on the form in which it is to be taken out. If, therefore, the plaintiff could recover those arrears at all, he must do so as administrator to the wife.

Patteson, J. concurred.—*Betts* v. *Kimpton*, 2 B. & Ad. 273. See also *Kinaston* v. *Mills*, 2 Hagg. 159. App.

PROFESSIONAL GRIEVANCES.

We opened an account in this Journal (speaking in mercantile phrase) some time ago, in the name of "Grievances to the Profession and the Public." As a sub-division of that larger account, we now advert to some letters which have been laid aside for some time, in consequence of the pressure of other subjects. Not that we thought these matters were unimportant, but others, from peculiar circumstances, claimed precedence.

TAXES ON LEGAL PRACTITIONERS.

There seems to be no sufficient reason for the arbitrary and unjust, because unequal, tax of 200,000*l.* a-year on attorneys, solicitors, and proctors. The usual deed-stamp on articles of clerkship, and an *ad valorem* on the premium paid, with a small fee on admission, ought to be the sole expense. Let the respectability of the profession be guaranteed by other means than the proof of the payment of 125*l.* at the Stamp-office, and an annual licence of 12*l.* Let the money be expended in obtaining sound and valuable instruction through the medium of Law Lectures. Let enquiries be made into the conduct and character of the applicant for admission on the rolls—and let him be examined on the extent of his knowledge of the principles of the law, and his experience in its practice. These will be found far better means of maintaining the "respectability of the profession," and guarding the interests of the public, than measuring

integrity and legal capacity by the dimensions of the purse.

If these investigations of moral and intellectual fitness should not be sufficient to attain the object—it might then be provided, in order to ensure the means of instruction, and to prevent the needless increase of the Profession, that no articled clerk should be taken by those who have been less than five years in practice; and those only who have been ten years should be at liberty to take more than one.

We have considerable doubts, however, of the expediency or necessity of resorting to these latter modes of repression, for they savour of monopoly, and cannot long continue to be beneficial to the public. At all events, we think that the means first mentioned, of strict examination into the integrity and competency of the applicants for admission, should first be fairly tried.

FEES AND OATHS IN THE NEW COURTS.

We have before adverted to these topics; but they are again pressed upon us by a Correspondent, and we agree with him, that the System is one so inveterate that it requires to be repeatedly attacked in order effectually to suppress it. To enable an attorney to practise in the superior Courts, he must pay six sets of fees, and take six sets of oaths. Surely, if he be a fit and proper person to practise in any one of the superior Courts, he must be eligible in all of them; and it is clear, that the leading statute of 2 Geo. 2, c. 23. was not intended to compel an admission in *all* the Courts, for by the 10th section, attorneys admitted in *any* of the Courts of Record, might practise in the others, in the name and with the consent of an attorney thereof. The production of the memorial of admission in one Court, and the payment of a small fee, should entitle the attorney to admission on the roll of the other Courts. Now, however, that the practice of the Common Law Courts is assimilated, there seems to be no ground for any distinct admission. A knowledge of the practice of one Court must be applicable to all: one admission, therefore, in a Common Law Court, should be deemed sufficient, and mal-practice in any one of them should subject the party to removal from all.

So the Courts of *Equity* ought also to be assimilated in practice, and then the knowledge of the practice of one of them would be sufficient for the other; and one admission should there also be deemed sufficient, —even without the formality of producing the memorial of admission.

The principle or object of the act of 2 Geo. 2, cap. 23, is very evident. Prior to the time of its passing, many unqualified persons acted in soliciting causes, to the manifest injury of the suitors, and the disgrace and annoyance of the Court. It is of the first importance in the administration of justice, that there should be a body of men who are responsible for fair-dealing between the Court and the suitor—protecting the Court from impositions which it could not possibly detect, and affording to the suitor complete knowledge of the practice, without which he would be constantly defeated, from ignorance of the regulations which are essential to the government of the Court.

Amidst the changes, therefore, which may be hereafter projected, we trust that these absurdities, not to say oppressions, will be avoided; and that as Counsel, called to the bar, have an undoubted right to practise in any or all of the Courts, whether of Law or Equity, the same just interpretation of the law and the obvious interests of the community, will be extended to the other branch of the Profession.

In taking up the letter of our correspondent "Advocatus," who, under another signature, has often appeared before our readers, and thus enlarging upon its contents, we rely that his object has been attained; and this notice, though tardy, will induce him, we trust, to resume his communications.

NOTICES OF BOOKS.

We have before us a whole shoal of small law-books, which are all pressing on us for notice. We shall make an attempt to clear some of them off.

1. *Instructions for preparing Abstracts of Titles, after the most improved System of Eminent Conveyancers; to which is added, a Collection of Precedents.* Reader, 1832.

This work is intended to promote "a more careful and systematic preparation" of abstracts of titles, and we think may be found of service. The rules given for abstracting are not very new, and are chiefly taken from the popular works on the subject; but the work contains some forms and precedents which seem to be carefully

framed, and we can safely recommend the work, on this account, to the profession.

2. *The Pupil's Guide through a Conveyancer's Chambers.* By a Barrister of Lincoln's Inn. Cabban, 1832.

Any work written for beginners in the law will be found serviceable, for there is a sad scarcity of elementary works; and in that view this little work will be found useful to the pupil. Some good rules are given as to collecting precedents, although we do not approve of the course of reading laid down, which puts Fearne on Contingent Remainders second on the list. The advice of one of our own contributors in an early number of our work, is much more judicious[a]; but, with this exception, we see nothing in this tract that will not be found useful to the student.

3. *Familiar and Practical Advice to Executors and Administrators, and Persons wishing to make their Wills, &c.* By Arthur J. Powell, Attorney at Law. Maxwell.

This work, according to the author's preface, is not written for the legal profession, but for other persons, whom it strongly recommends to set about making their wills, "as the tenure of human life is at all times uncertain," and he thinks it will be well "if the dread of the Cholera Morbus, or any other infliction," shall tend to this desirable result. It would be unfair to criticise a work of this kind very strictly; and as far as we have examined it, it appears to us likely to be useful to the persons for whose use it is prepared. We cannot say much, however, for the forms, which are antiquated and incorrect.

THE STATUTES AT LARGE.

CHEAP EDITION.

The publication of cheap and valuable books,—a fashion which is daily gaining ground,—is much to be commended. We lay claim to some share in the merit of setting an example in regard to legal works. The profession is sufficiently numerous to ensure ample encouragement for books written by competent persons, on subjects which are really useful; and we have no reason to regret that we have continued for eighteen months steadily to pursue the course on which we originally determined.

It will be an agreeable surprise to those who have been accustomed to bear the heavy expense hitherto incurred of the Statutes at large, and even to those who had occasion for particular classes of Acts, to find that the whole of them may now be obtained at a rate rivalling the cheapest periodicals of the day. We observe that the first three numbers already published, comprising fifteen Acts, printed in the best manner on royal octavo, may be bought for sixpence. The work being done by the King's Printer, we presume can be used in all courts and places as an authorized edition. It is intended to print in this form all the Public Acts—an undertaking, of course, not within the scope of the present Journal, which is necessarily limited to the Statutes immediately relating to the Law, and those subjects with which it is peculiarly the duty of Legal Practitioners to be well acquainted.

ON THE LAW RELATING TO LIFE INSURANCES.

Sir,

I beg to call your attention, and that of your subscribers, to a passage in your report of the case of *Boson* v. *Bolland*, vol. 3, p. 423, by which it appears that a life-insurance was made in the name of a trustee, and afterwards abandoned as void under the statute of 14 Geo. 3. c. 48. This is a matter of great importance to the public. I believe it to be very common, as a provision for marriage, to make life-assurances in the names of trustees. It not only falls within my own experience, but I have the same information from the actuary of a most respectable office. In the case of *Tidswell* v. *Angerstein*, in Peake's Ni. Pri. Cases, p. 151, Lord *Kenyon* upheld a life-assurance made by an executor; and I cannot see any sound principle for distinguishing such an insurance from one in the name of a trustee in a marriage settlement, or for any other purpose where there is nothing of a gambling or a wager-like speculation. In some instances the insurance has been made by a husband, and assigned to the trustees in the settlement; but although in this mode the objection to the policy would be removed, so far as it applies to the original concoction, yet, as appears by the case of *Godsall* v. *Boldero*, 9 East, 72, that a policy, however good at the outset, may subsequently, by an extinction of the interest in the assured, become void, I do not see that the circuity of taking the policy in the name of the last and subsequent assignment would mend the matter; and clearly at the time when the claim shall arise, the assignees would be in the condition of persons having no interest for their own benefit. I have been told, that the Equitable Office would not take the objection to which I have alluded; and I have reason to

[a] Vol. I. L. O. p. 30.

know that it is not the only office that would scout such an objection: but that alone is not sufficient. If such an insurance be void, the act of 14 Geo. 3. ought, without delay, to be amended retrospectively; and I hope your useful publication may draw the attention of one of the M. P. directors of the Law-Life, or some other public company, to the remedy.

W. H. C.

RETURNS IN EASTER TERM, AND INDORSEMENT OF WRITS.

We call the attention of our readers to two very important decisions in the present term, the former of which decides, that a writ may be made returnable on any of the days between the *Thursday* before, and the *Wednesday* after *Easter* day, when those days fall in *Easter* term: and the latter, that the new rule, the second of Hilary term of the 2 W. 4, requiring the indorsement of the amount of debt and costs demanded by the plaintiff, is peremptory, and not directory.

LILLY *v.* GOMPERTZ.

Talfourd shewed cause against a rule obtained by *Platt*, for setting aside a *latitat* and all proceedings thereon, and delivering up the bail bond to be cancelled, for irregularity. The irregularity was, that the *latitat* had been made returnable on the *Saturday* before *Easter* day. The question here arose upon the construction of the 11 Geo. 4, and 1 W. 4. c. 70, § 6, and the 1 W. 4. c. 3. § 3. The words of the former act were, "that if the whole or any number of the days intervening between the *Thursday* before, and the *Wednesday* next after *Easter* day, shall fall within *Easter* term, there shall be no sittings in banc on any of such intervening days; but the term shall, in such case, be prolonged, and continue for such number of days of business as shall be equal to the number of the intervening days before mentioned, exclusive of *Easter* day, and the commencement of the ensuing *Trinity* term shall in such case be postponed, and its continuance prolonged for an equal number of days of business." The 1 W. 4. c. 3, § 3, provided, "in case any of the days between the *Thursday* before, and the *Wednesday* next after *Easter*, shall fall within *Easter* term, then such days shall be deemed and taken to be a part of such term, although there shall be no sittings in banc." He submitted, that this latter act having made the intervening days in question "part" of the term, although no sittings in banc take place, a writ returnable on any of those days was regular. In the case of *Hall* v. *Welshman*, in the Exchequer, which was not yet reported, it had been decided that a writ made returnable on any of those days was regular.

Platt, contrà, contended, that as the Court did not sit in banc on any of those intervening days, and consequently no judgment could be given on any of them, they were *dies non juridici*. He cited *Henworthy* v. *Peppiatt*, 4 B. & A. 288, wherein it was holden that a bill of *Middlesex*, made returnable on a *dies not juridicus*, was altogether void.

Cur. adv. vult.

Taunton, J.—I have conferred with the other Judges, and we are all of opinion that under the late act of parliament those days, though not *dies juridici* for the sittings of the Court in banco, are to be taken as part and parcel of the term; and, therefore, that it was no irregularity that this *latitat* was made returnable on the *Saturday* before *Easter* day.

Rule discharged.—E. T. May 5th, 1832.

RYLEY *v.* BOISSOMAS.

Platt shewed cause against a rule for setting aside proceedings for irregularity. The irregularity complained of was, that the amount of debt and costs had not been indorsed on the process according to the direction of the second division of the rules of *Hilary* term. The process here was an *alias* bill of *Middlesex*. He submitted, that the rule only applied to process originally issued this term; as the rule did not come into operation till the first day of this term. The process here was not process originally sued out this term, but a continuation of process sued out before the rule came into operation. Besides, the terms of the rule were only directory.

Taunton, J.—To say that it is only directory, is only, in other words, to say that it means nothing. This must be considered as an irregularity. We have determined to treat any dereliction of it as an irregularity. It is a very important rule; and the object of it, which is to enable the defendant to pay debt and costs before any unnecessary expense is incurred, would be disappointed if this were not considered as an irregularity.

Rule absolute.—E. T. May 7th, 1832. P. C.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

PRACTICE.

Persons who are not parties to the original suit, but come in before the master, and prove their title to the property, the subject of the suit, file a supplemental bill, praying to be allowed to stand in the place of the party in the suit whose claim they have neglected; Held, that they are entitled to be so admitted, and to have the benefit of all the proceedings had in the original cause.

The *Lord Chancellor* gave judgment in this case some days before the last recess. It was a continuation of the cause of *Freeman* v.

Fairlie, a suit of long standing in this Court, being first instituted by a legatee against the executor of a Mr. Oldham, who died in the East Indies many years ago, leaving a considerable estate there, both real and personal. The Attorney General afterwards became a party to that suit on the part of the crown, on the ground that Mr. Oldham died intestate as to his real property, and that he left no heirs to whom it would descend. The East India Company also claimed, as against the crown, on the ground that all landed property within the territory of the East Indies belonged to them. The present plaintiffs, two poor women, one of the name of Oldham, and another Smith, claimed as heirs of the deceased Oldham, *ex parte paterna*, and an issue was granted to them out of this Court to establish their pedigree and claim. That issue was tried at the country assizes, and the plaintiffs failed to prove their pedigree on the paternal side. The present defendant, Eborel, next came in, and claimed to be the heir of the deceased, Oldham, *ex parte materna*; and upon an issue granted to him, he succeeded in establishing that relationship. The Attorney General immediately withdrew the claim of the crown, and Eborel was allowed to stand in his place, a party to the suit. In a subsequent stage of the cause, a question of great importance was elaborately argued in this Court, before Lord *Lyndhurst*, Chancellor—that question was, as to the nature of the landed property left by the deceased in India. That was situated within the precincts of Calcutta; and Lord *Lyndhurst*, after well considering the case, decided that it was freehold property, descendible like freeholds in England. The East India Company next withdrew their claim. Under the decree then made by that learned Lord, Eborel was deemed to be entitled to that property, and to the proceeds, which had been paid into Court to the credit of this cause for many years, and which have accumulated to a very considerable sum. The present plaintiffs, Mrs. Oldham and Mrs. Smith, then applied for a new trial, on the ground that they had discovered such new evidence as would establish beyond doubt their pedigree, *ex parte paterna*. A new trial was granted them, Eborel being in the meantime restrained from touching the fund in Court, or taking any other step in the cause. Upon that second trial the plaintiffs succeeded in proving themselves the next heirs. They next filed their bill here—a supplemental bill, praying to be allowed to stand in the suit in place of Eborel, and to have the benefit of all the proceedings hitherto had in the cause, as Eborel himself had. His lordship thought it would be a great hardship upon these plaintiffs, who now established their claim to this property beyond a doubt, to be obliged to commence all the proceedings *de novo*, by great trouble, expence and delay, and he therefore granted the prayer of their bill. Eborel was allowed to come into the place of the Attorney General, and he had the benefit of all the proceedings that were had in the suit up to that time. It was but just that these plaintiffs should now have the like benefit, and stand in Eborel's place.—*Oldham* v. *Eborel*, March, 1832. L. C.

KING'S BENCH.—PRACTICE COURT.

LANDLORD AND TENANT.—JUDGE'S ORDER TO HOLD TO BAIL.

The Court will not make an order to hold a tenant to bail under 11 *Geo.* 2. *c.* 19. § 3, *for double the amount of goods clandestinely and fraudulently removed from premises on which arrears of rent have accrued.*

Cresswell moved for a rule to shew cause why an order should not be made for holding a person named Oswald to bail, on the 11 Geo 2. c. 19. § 3, in double the amount of certain goods and chattels, fraudulently and clandestinely removed by him from premises on which arrears of rent had accrued. He made this application on the part of the landlord. He was not aware of any instance in which the Court had interfered to make such an order; but from the instances to be found in the books of practice, he conceived it might be made. Mr. Tidd (1 Prac. 172) says, "In an action of debt, on a penal statute, the defendant cannot be arrested, though it be for a sum certain; as it is a maxim, that every man shall be presumed innocent of an offence till he be found guilty. But when an action is brought on a remedial statute, as for money won at play; or on a statute which expressly authorises an arrest, as for exporting wool; double value for holding over; having unsealed wrought silks; or insuring lottery tickets, &c. then the defendant may be arrested." Now, it has frequently been held, that the statute of 11 Geo. 2. is a remedial act, on principle; therefore, the Court have power to make such an order.

Taunton, J.—Why did not the landlord pursue the goods, and seize them, as he has a right to do, within thirty days of the removal? He should have made use of that remedy before he has recourse to the action for the penalty. The former remedy is given in a previous part (§ 1.) of the statute; the action for the recovery of the penalty is given in a latter part of it (§ 3.)

Cresswell.—The goods have been sold as well as removed, and therefore he could not seize the goods.

Taunton, J.—If the law allows you to arrest the defendant, arrest him: if it does not, I am not competent.

Cresswell.—There are many cases in which the law allows an arrest; but not without the authority of an order of a Judge; and this, I submit, is one of those cases.

Taunton, J.—This statute has been passed near a hundred years, and yet no precedent can be found of a Judge's order having been made to hold a tenant to bail under such circumstances. That is strong evidence to shew, that no such order ought to be made.

Rule refused.—*Sutton* v. *Oswald*, E. T. April 27th, 1832. K. B. P. C.

BANKRUPTCY COURT OF REVIEW.

SUPERSEDEAS. — TRADING. — FARMER. — CONCERT. — FRAUD. — CATTLE DEALER.

The Court will decide a question of trading, without directing an action to be brought, in a case in which affidavits had been filed and answered, and other affidavits filed from time to time, in contradiction and explanation of the affidavits themselves, so that the fact of trading had been put in issue by all parties.

It is too late to take an objection to a deed, under which the petitioner claimed, at the conclusion of all the arguments on the principal question in issue upon the affidavits.

A farmer cannot be made a bankrupt as such, nor can he be made a bankrupt as a dealer in cattle, unless the cattle be sold without having been pastured on the farm; nor where they are bought, fed, and sold, as in the ordinary proceedings of a farmer, or incidental to that business.

Concert is no longer an objection to a commission of bankrupt; sed quere, *whether it would be so, if accompanied with a fraudulent intention to defeat a deed previously executed by the bankrupt.*

This was the petition of Charles Springett and two others, describing themselves as creditors of John Springett. The petition set forth, that in April 1828, John Springett executed a conveyance of his real estate to the petitioner Charles Springett, upon trust to sell, and pay the produce of the sales to himself and the other petitioners, and certain other creditors of John Springett, in the conveyance mentioned. The petition further stated, that on the 15th of December, 1831, a commission of bankrupt, on the petition of George Hills, was issued against John Springett, and upon which he was declared bankrupt. That such commission was so issued by the said George Hills, with the privity of John Springett, to defeat the conveyance so made by him as aforesaid. That John Springett was only a farmer, and had not, for many years past, been a trader. That such commission so issued against him as a cattle dealer. That he was not a cattle dealer; but only occasionally bought cattle, for the purpose of grazing them on his farm, and as incidental to his occupation of a farmer.

The petition prayed, that the commission might be superseded, and the costs paid by the petitioning creditor and the bankrupt.

In the matter of this petition, affidavits have from time to time been filed, in support of the petition, and against it, and in contradiction and explanation of allegations in the affidavits themselves. The case commenced on the 16th of April, when Mr. *Montagu* opened the petition. The material facts will be collected from what fell from the Judges, in their judgments. On the 18th of April, Mr. *Barber*, also of counsel for the petitioners, addressed the Court.

Mr. *Chandless* appeared for the assignees, and expressed the wishes of his clients, that the Court would decide the question; and Mr. *Swanston* for the petitioning creditor and the bankrupt. The case was resumed on the 26th of April, when Mr. *Swanston*, having before him the conveyance of the real estate in 1828, stated that it recited a bill of sale made by the bankrupt, of all his personal estate; and argued, that as this deed conveyed all his real estate, the new conveyance constituted clearly an act of bankruptcy.

Mr. *Montagu* answered, that the commission was a fraudulent one, concocted by a man who really was no trader at all.

The Court then proceeded to give judgment.

The right honorable *Thomas Erskine*, C.J.— In this case, the only difficulty on my mind is, whether we ought to decide it upon the affidavits before the Court, or leave the assignees to bring an action to recover the property contained in the deed before the Court; and if the objection to that deed had been taken in the first place before the various affidavits had been made, I should have said, that the petitioning creditor ought to have the opportunity to bring an action; but inasmuch as the objection is only taken,—and as I am of opinion no trading has been proved, I think it would be a hardship to send it for a trial at law. This is a petition, stating that the commission was merely to defeat the deed. Since the late statute, concert would be no ground for superseding the commission. But it is alleged, the commission was issued for a fraudulent purpose. This the bankrupt has denied; and I find no proof of it on affidavit. Had it been made out, I should have said that was a fraudulent object; and I should have said, that the bankrupt must have concerted with the petitioning creditor, to get rid of the deed. But we come to the question, whether, were the party a trader or not, it would be contrary to justice to allow the commission to stand.—Will, then, this Court supersede the commission at the instance of these petitioners, who do not present themselves as creditors under the commission, but under the deed? The question now is, whether the petitioning creditor shall be allowed to try this question at law; but I do not think it will be fair to put the petitioners to the expense of trying this at law; and I think upon the affidavits themselves, it would hardly be justice to the petitioning creditor himself. Upon an attentive perusal of the affidavits of the bankrupt and others, I am of opinion that he was not a trader; that his dealing was merely as a farmer, and as incidental to it. I am of opinion that this commission ought to be superseded.

His honor Sir *Albert Pell*. — I am of the same opinion with the Chief Judge. I hold it to be my duty, if I can consistently with law or practice, to save the time, trouble, and expense of parties. Who are the parties, and what is the point? The parties are the petitioning creditor; or, in other words, the bankrupt, for they run together, the petitioners,

and the assignees under the commission. We have counsel also for these parties. We have therefore all the parties before us whose interest could be affected. The question simply is, is John Springett a trader within the meaning of the bankrupt laws, or is he not? Is he a trader by buying and selling? For two days counsel were heard on these questions. The assignees, by their counsel, have requested that we will decide the question: they all tell us they come here to have this question decided; and it is a question within our jurisdiction. The act which constitutes this Court, in the preamble of it, states, that it is expedient to provide means of administering and distributing the estate and effects of bankrupts, and of determining the questions which from time to time arise touching the same, to the end that the rights, as well of the bankrupts themselves as of their creditors, may be enforced with as little expense, delay, and uncertainty as possible: why then should there be more delay? I am anxious to decide as soon as I can, and save the parties expense. Where I find a deed executed in 1828, and the parties in possession under it, I cannot but think it extraordinary, that in December, 1831, a commission is taken out against the party conveying by that deed, now trying to prove that he was a trader, as a cattle dealer; and failing in that, then to shew another species of trading, in which he has also failed: is not that a circumstance to weigh in my mind? and without going to the length of saying that this is a fraudulent commission, I find sufficient to say that this commission was taken out to defeat the deed. Now, as to the trading, what is proved? That he, being an occupier of land, had purchased cattle and sheep, for the purpose of the farm, and for no other purpose whatever. I watched for evidence, shewing the purchase of cattle, and their sale soon after in the same state as that in which they were purchased, so as to lead my mind to believe that his sole object was profit without the depasturing the cattle upon the farm. Ought I to refuse to give judgment upon the question, and to allow it to be carried elsewhere? I assent to the opinion of the Chief Judge, that John Springett has failed in the evidence to shew that he was a trader, and therefore the commission must be superseded.

His honor Sir *John Cross*.—As a farmer, he is expressly excepted by the bankrupt laws. I can find no trading debts, and there are none whatever. I am of opinion that he is no trader. The act of bankruptcy is in the affidavit of Neale, that the bankrupt had directed him to say he was not at home, and that he denied him to one Day, whom he knew to be a creditor; but I do not find any proof of a debt to Day on the proceedings, nor is it in any other way proved. The book of the bankrupt, of his sales and purchases, mentioned in his affidavit, has not been in Court. The real fact is, that instead of being a trader, owing many debts, he owes nothing at all, except on bond and promissory notes, borrowed for the purpose of buying real estates. The whole appears to me to be the proceedings of the bankrupt to annul his own deed,—to defraud those to whom he had made this conveyance of his real estate. Here is the bankrupt and petitioning creditor acting together: the petitioning creditor is also provided for by the deed. The assignees crave that we will decide whether the bankrupt is a trader or not. Delay is the great enemy of justice; and there would be delay in sending this question to be decided by a jury. My notion is, that we are expressly constituted by the act, to make law and equity flow in the same channel: and this Court is empowered to examine witnesses *viva voce*, to decide issues of fact. The Court is constituted to prevent the waste of property: an order has been made by the Court, to examine witnesses *viva voce*; but the bankrupt has not availed himself of it. I look to the affidavits in support of the commission, and from them I come to the conclusion, that this bankrupt is not a trader. I cannot yield to the request of the petitioning creditor and bankrupt, to send this to a jury; and I am of opinion that the commission should be superseded.

His honor Sir *George Rose*.—There is no proof of trading; and the commission must be superseded.—*In re Springett*. 16th, 18th, and 26th April, 1832. B. C. R.

MIDLAND CIRCUIT.

ATTORNEY—ESCAPE—SHERIFF.

This was an action tried at Derby, on the last circuit, before Mr. Baron *Bayley*. It was an action against the sheriff for an escape, under the following circumstances:

The plaintiff had arrested the defendant in the original action on a writ issued out of the Court of Common Pleas. The defendant in that action intended to be rendered in discharge of his bail, in order to take the benefit of the Insolvent Act. He accordingly gave instructions to his attorney, who put in bail in the King's Bench, by mistake. No notice of this irregularity was taken by the plaintiff's attorney. He suffered the bail to justify without opposition, and a *supersedeas* was issued, and sent down to the undersheriff of Derby. The undersheriff, who knew that there was only one writ out against the defendant, did not examine the writ of *supersedeas*, and ordered the defendant's discharge.

Upon this the present action was brought. The Judge, in summing up, spoke in terms of great disapprobation of the plaintiff's attorney, whose professional duty (although, perhaps, not his legal duty) it was to have given notice of the mistake. This course of proceeding was not fair, either as regarded the defendant's attorney, or the undersheriff. He might have given them notice of the irregularity on two occasions:—on the service of the notice of bail, and of the rule of allowance. These circumstances, therefore, he directed the jury to take into consideration in estimating the damages. The debt, in the original action, was 53*l*., and the plaintiff also claimed 2*l*. 7*s*. for the under-

sheriff's charge. The Judge told the Jury that they should also take into consideration the chance the Plaintiff had of losing his debt in the original action (which was set up as a defence by the undersherift), and also whether the unfair conduct of the plaintiff's attorney did not affect it. He also called their attention to the fact that the undersheriff's charges were duly paid on the 18th May, and the writ in this action issued the next day, and observed that they were not obliged to allow this, if they thought it had only been paid with the intention of bringing this action. The Jury returned a verdict for 26*l*. *Bootes* v. *Colville*, ——. [From Professor Amos' Lectures.]

NOTES OF THE WEEK.

THE COMMON LAW PROCESS BILL.

We have not received the promised objections to this measure. It is one of considerable importance, and ought to be well considered. We hear that the attorneys in the inferior Courts are already beginning to apprehend the serious diminution of their exclusive emoluments. It is indeed reasonable to suppose that creditors, instead of being obliged to employ strangers, however respectable, will prefer the legal advisers with whom they are acquainted, and the liberty of choosing from the extensive Bar of the Superior Courts. By resorting to the Courts at Westminster, the suitor has also the advantage of a Bench distinguished by the most eminent learning.

The effect of the New Rules of Court, and of the Bills proposed by Lord Tenterden, will be to diminish the expense and remove the causes of delay in actions to which there is no defence; but where the case is important, the allowance of costs, particularly as between party and party, will be considerably increased: and it is essential that the occasions of dissatisfaction between the solicitor and client, on the subject of *extra* costs, should be diminished as much as possible. So far, therefore, the new measures must be beneficial to the practitioners of the Superior Courts. Still we recommend our readers to examine carefully the provisions of the several bills now in progress, all of which have been stated in this Journal.

The Bill has passed through a Committee of the House of Commons without amendment, and stands for the third reading.

USURY LAWS.

On Tuesday Mr. Mackinnon obtained leave to bring in a bill for the partial abolition of the Usury Laws.

COURTS OF REQUEST AND SMALL DEBTS.

Mr. Hunt has moved for returns relating to the Courts of Request in London, Westminster, and Middlesex; and Sir Robert Peel and Lord Althorp both admitted the necessity of some new measure for the recovery of small debts, which the former, however, thought should be postponed until the house had received the Report of the Common Law Commissioners on imprisonment for debt.

CHURCH REFORM.

Mr. Hume moved for returns of the pluralist clergymen in the Church of England.

ANATOMY BILL.

The report was brought up on Tuesday, and the bill was ordered to be read a third time on Thursday.

OFFICERS OF EXCHEQUER OF PLEAS.

The Bill for the better regulation of the duties of these officers has passed the House of Lords.

LUNATICS.

Their Lordships have passed a Bill to diminish the inconvenience and expense of commissions in the nature of writs *de lunatico inquirendo*, and to provide for the better care and treatment of idiots, lunatics, and persons of unsound mind, found such by inquisition.

CONTEMPTS IN ECCLESIASTICAL COURTS—PRESCRIPTION—PRESCRIPTION (TITHES).

These bills wait in the House of Lords for the second reading.

SENTENCE OF DEATH—REMEDIES AGAINST THE HUNDRED.

These bills wait for a Committee of their Lordships.

CONTEMPTS IN EQUITY.

This bill waits for the third reading in the House of Lords.

PUNISHMENT OF DEATH ABOLITION BILL.

Committee (House of Commons) appointed for Monday the 21st instant.

LIMITATION OF ACTIONS.

The Committee has been appointed to meet on Monday next.

FINES AND RECOVERIES—CURTESY—DOWER —INHERITANCE.

The report on these bills to be further considered on Monday.

ARBITRATION.

The order for the third reading of this bill has been discharged, and the bill re-committed for Tuesday next.

THE LATE CHANGE OF MINISTRY.

We have always cautiously abstained from being the vehicle of mere professional gossip. We shall not therefore notice the various rumours which we have heard within the last few days. In our next publication we shall probably be able to give a complete account of the recent changes, so far as they relate to the law. At present we can only state that Lord Lyndhurst is certainly entrusted by the King with the formation of a new ministry, and that Sir Edward Sugden has been sent for, and will be included in the new arrangements.

ANSWERS TO QUERIES.

COMMON LAW.

STOLEN NOTES. VOL. III. P. 411.

If the holders of the bills which were stolen can prove that they received them in the usual course of business, for a full and valuable consideration, and without any knowledge that they had been stolen, they will be able to recover the amount from the Bank of England. *Miller* v. *Race*, Burr. 452. *Lawson and others* v. *Weston and others*, 4 Espinasse N. P. C. 56. But if they took the bills without exercising a proper degree of caution, they will be unable to recover, although they may have given their full actual value. *Solomons* v. *Bank of England*, 13 East Rep. 135, n. *Lowndes* v. *Anderson*, 13 East Rep. 130. *Gill* v. *Cubitt*, 3 Barn. & Cres. 466. Greater caution in taking bills appears to be required where the amount of the bill is large, than when the value of the bill is trifling; and if the party who took the ten pound note is in the habit of transacting business to a considerable extent, it will be sufficient if he proves that it was taken in the usual course of business, although he may be unable to prove from whom. With regard to the 100*l.* note, it does not appear that there was such a want of caution as would (according to the cases above cited) prevent the holder from recovering. Notice should be given to the holders, to prove that they took the bills *bonâ fide* and for value. *Vide Rees* v. *Marquis of Headford*. 2 Comp. N. P. C. 574.

J. S. T.

EVIDENCE.—ILLEGITIMACY. VOL. III. P. 426.

I incline to think, that a married woman is competent to give evidence against *any* man by whom she had issue, previously to marriage. No proof exists that she is going to give testimony against her husband, until her oath is taken. *Vide* Phillips's Law of Evidence.

X.

LAW OF ATTORNEYS.

CERTIFICATE.—COUNTRY. VOL. III. P. 268.

This seems to me one of the questions which the stamp act, abounding, as it confessedly does, with doubts and difficulties, clearly defines. On reference to the schedule of the act, it will be found, that the certificate to be taken out by an attorney, &c. "if he shall reside in the city of London, or city of Westminster, or *within* the limits of the twopenny post in England," shall be charged with a duty of twelve pounds: and "if he shall reside *elsewhere*, eight pounds:" so that to render an eight pound certificate efficient, the residence must be *without* the limits of the twopenny post (*i. e.* residence for practical purposes; for *residence without*, and an *office within* the limits, will not avoid the higher duty). What such limits are, may be ascertained by referring to the post-office regulations, which express the places to which the delivery extends; but these are not fixed by a given "*radius*" from the post-office, in the manner prescribed for finding the limits of the metropolis, under the new hackney coach act.

H. H. H.

QUERIES.

COMMON LAW.

HORSE.—WARRANTY.

A. instructed *B.* to purchase a horse for him from *C.*, and at the same time to procure for him a warranty. *C.* replied to *B.*'s letter in the following terms: "I will accept your friend's offer for the horse; he is perfectly sound; and for your friend's satisfaction, I enclose a veterinary surgeon's certificate." The words of the certificate are: "I do not hesitate to warrant him sound in every respect." The horse subsequently proved unsound; and it can be proved that a curative process had been applied to him prior to the sale. The vendor, however, refuses to receive him back, alleging that he had never warranted him. The question is, whether by enclosing the veterinary surgeon's warranty, the vendor did not make it his own, and become bound by it towards the purchaser?

X. Y. Z.

ATTORNEY.—PARTNERSHIP.—INTEREST.

A. and *B.*, attornies, enter into partnership for a term, during which *A.* draws out more

than his share of the profits. Upon the settlement of accounts, at the expiration of the term, is not *A.* chargeable with interest upon such surplus? I believe it to be the general practice in the masters' offices, upon partnership accounts, to calculate interest upon all sums drawn out by each partner; and I have some recollection of such practice having been judicially recognized, in a recent case, which arose out of some collateral question; but of which I have not been able to find a report.

J. A. M.

INFORMATION.—PEDLAR.

On the hearing of an information against a pedlar, "for hawking manufactured goods without a license, not manufactured by himself," is it for the informer to prove that the pedlar did not make the goods, to obtain a conviction? or is it for the pedlar to prove that he did make the goods, to avoid a conviction?

A. B.

BILL OF EXCHANGE.—GOOD FRIDAY.

The holder of a bill of exchange having a bill due on Good Friday, neglected to present it till the following Saturday, when it was returned, and notice of the dishonour was sent to the drawer and indorsers by that night's post. Are the drawer and indorsers discharged by this neglect of the holder? It is to be observed, that had the bill been presented on the Thursday, as it ought to have been, the notary would not have returned it till the Saturday; so that notice of the dishonour could not have been given sooner.

P. T. W.

LAW OF PROPERTY AND CONVEYANCING.

DEVISE.—GIFT.

A. B. had two sons: he settled a sum of money upon *C.*, one of them, and then made his will, reciting that he had done so, and intended to make over to *D.*, his other son, property equal in value to the sum settled upon *C.* Shortly afterwards, he *executed* a deed of gift, transferring such property to, or in trust for *D.*; but retained possession of the deed and property during his life, and allowed *D.* interest for the value of the property, instead of suffering him to receive the annual proceeds. Is *D.* entitled to such property, legally or equitably, upon *A. B.*'s decease?

X.

MISCELLANEA.

DR. PALEY AND HIS WRITINGS.

The treatise by Dr. Paley, on Moral and Political Philosophy, exemplifies the natural tendency of narrow and domineering interests to pervert the course of inquiry from its legitimate purpose. As men go, this celebrated and influential writer was a wise and virtuous man. By the qualities of his head and heart, by the cast of his talents and affections, he was fitted, in a high degree, to seek for ethical truth, and to expound it successfully to others. He had a clear and a just understanding; a hearty contempt of paradox, and of ingenious, but useless refinements; no fastidious disdain of the working people, but a warm sympathy with their homely enjoyments and sufferings. He knew that they are more numerous than all the rest of the community, and he felt that they are more important than all the rest of the community to the eye of unclouded reason, and impartial benevolence. But the sinister influence of the position which he unluckily occupied, cramped his generous affections, and warped the rectitude of his understanding. A steady pursuit of the consequences indicated by *general* utility, was not the most obvious way to professional advancement, nor even the short cut to extensive reputation. For there was no impartial public, formed from the community at large, to reward and encourage with its approbation, an inflexible adherence to truth. If the bulk of the community had been instructed, so far as their position will permit, he might have looked for a host of readers from the middle classes. He might have looked for a host of readers from those classes of the working people, whose wages are commonly high, whose leisure is not inconsiderable, and whose mental powers are called into frequent exercise by the nature of their occupations or callings. To readers of the middle classes, and of all the higher classes of the working people, a well made and honest treatise on moral and political philosophy, in his clear, vivid, downright, *English* style, would have been the most easy and attractive, as well as instructive and useful, of abstract or scientific books. But those numerous classes of the community were commonly too coarse and ignorant to care for books of the sort. The great majority of readers who were likely to look into the book, belonged to the classes which are elevated by rank or opulence, and to the peculiar professions or callings which are distinguished by the name of "liberal." And the character of the book which he wrote betrays the position of the writer. In almost every chapter, and in almost every page, his fear of offending the prejudices commonly entertained by such readers, palpably suppresses the suggestions of his clear and vigorous reason, and masters the better affections which inclined him to the *general* good. He was one of the greatest and best of the great and excellent writers, who, by the strength of their philosophical genius, or by their large and tolerant spirit, have given imperishable lustre to the church of England, and extinguished or softened the hostility of many who reject her creed. He may rank with the Berkeleys and Butlers, with the Burnetts, Tillotsons, and Hoadlys. But in spite of the esteem with which I regard his memory, truth compels me to add that the book is unworthy of the man: for there is much ignoble truckling to the dominant and influential few. There is a deal of shabby sophistry in defence or extenuation of abuses which the few are interested in upholding.—*Austin's Province of Jurisprudence determined.*

The Legal Observer.

VOL. IV. SATURDAY, MAY 19, 1832. No. LXXXIII.

——— "Quod magis ad NOS
Pertinet, et nescire malum est, agitamus."
HORAT.

THE LATE CHANGES.

IT has always been one of our duties, to record the changes which have taken place in the profession to which we belong, and whose wishes and sentiments we believe we represent; and we have generally not contented ourselves with the bare record of the facts, but have endeavoured to enable our readers to form an opinion as to their propriety. We have this week to notice the changes which have recently agitated the country. At the time at which we write we know not to what they will lead; nothing has been settled. We know not who will be *in*, or who *out*. We can merely state what we have already heard, and which we believe to be correct, and hint at what we wish to hear.

On Wednesday the 9th inst. as is known to all, the resignation of the Lord Chancellor was accepted, and on the same day Lord Lyndhurst received a message from the King, requesting his immediate attendance. He was desired to communicate with such persons as he should see fit, for the formation of an administration. He first applied to the Duke of Wellington and Mr. Peel, who declined to take part in it. He then communicated with Lord Harrowby, who stated his settled determination never again to hold office. A second application was then made to the Duke, and he consented to join with Lord Lyndhurst in the formation of a ministry. He applied to many persons for the purpose;—*we* need only mention the lawyers. Sir Charles Wetherell, Sir James Scarlett, and Sir Edward Sugden, were all, we believe, invited, but all declined. After many other fruitless applications, on Tuesday last the Duke of Wellington and Lord Lyndhurst waited on the King to state the failure of their attempt, and the King then sent for Lord Grey.

At the time we write, (for our sheet is necessarily made up early in the week), this is all that is known. We must however state our hope that the result will be that the present Lord Chancellor may continue in office. Our opinions as to this have never varied: if our readers have any wish to know them, they may be found in a former number, when the circumstances to a certain extent resembled the present.[a] We are ready to censure and scrutinize the conduct and measures of the Lord Chancellor when in power; but we think it would be a serious misfortune to the country that he should now leave office: and this we think is, at the present moment at least, the general opinion of the profession.

We shall not lose sight of the address to the Bar, which the Lord Chancellor delivered on Saturday last. He there opened some new and very important subjects, which we shall speedily enquire into. At present the great question of his continuance in office presses too strongly on the public attention to admit of the discussion of any minor matter. All must be decided before this meets the eyes of our readers.

[a] 2 L. O. p. 369.

THE LAW RELATING TO SEDITIOUS MEETINGS.

On a former occasion we laid before our readers the state of the law relating to Political Unions.[a] It has been suggested that recent events render it important that we should advert to the enactments on the subject of Seditious Meetings. We do not intend to enter on the discussion of the circumstances out of which the present excited state of the public mind has arisen; and we are inclined to think, both from the past history and general character of our countrymen, that they will patiently try all possible expedients to attain their object, before they resort to any illegal measures.

We are however willing to assist in diffusing sound and accurate information as to the state of the Law in question, and we have therefore turned to the report of the charge of Lord Chief Justice Tindal, delivered at Bristol on the 2d of January. We give an abridgment of it, and think it will be found to contain all the material Statutes, as well as the Common Law, applicable to the subject before us.

The law of England hath at all times held in the greatest abhorrence riotous and tumultuary assemblages of the people. No man can foresee at the commencement what course they will take, or what consequences will ensue. Though cases may occur in which the object of such assemblies is at first defined and moderate, they rapidly enlarge their powers of mischief, and from the natural effect of the excitement and ferment inseparable from the collection of multitudes in one mass, the original design is quickly lost sight of, and men hurry on to the commission of crimes which at their first meeting they had never contemplated. The beginning of tumult is like the letting out of water—if not stopped at first it becomes difficult to do so afterwards; it rises and increases, until it overwhelms the fairest and the most valuable works of man. It has been well said, that the use of the law consists,—first, in preserving men's persons from death and violence; next, in securing to them the free enjoyment of their property; and although every single act of violence, and each individual breach of the law, tends to counteract and destroy this its primary use and object, yet do general risings and tumultuary meetings of the people in a more especial and particular manner produce this effect; not only removing all security both for the person and property of man, but for the time putting down the law itself, and daring to usurp its place. The law of England hath accordingly, in proportion to the danger which it attaches to riotous and disorderly meetings of the people, made ample provision for preventing such offences, and for the prompt and effectual suppression of them whenever they arise.

In the first place, by the common law, every private person may lawfully endeavour of his own authority, and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power. He may disperse or assist in dispersing those who are assembled: he may stay those who are engaged in it from executing their purpose: he may stop and prevent others, whom he shall see coming up, from joining the rest, and not only has he the authority, but it is his bounden duty as a good subject of the King to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evil-doers, to keep the peace. Such was the opinion of all the judges in the time of Queen Elizabeth, in a case called "the case of arms" (Popham's Rep. 121),—although the judges add, "that it would be more discreet for every one in such a case to attend and be assistant to the justices, sheriffs, or other ministers of the King, in doing this." It would undoubtedly be more advisable so to do, for the presence and authority of the magistrate would restrain the proceeding to such extremities until the danger was sufficiently immediate, or until some felony was either committed or could not be prevented without recourse to arms; and at all events the assistance given by men who act in subordination and concert with the civil magistrate will be more effectual to attain the object proposed than any efforts, however well intended, of separate and disunited individuals. But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself, and upon his own responsibility, in suppressing a riotous and tumultuous assembly; and he may be assured that whatever is honestly done by him in the execution of that object, will be supported and justified by the common law.

Whilst I am stating the obligation imposed by the law on every subject of the realm, I wish to observe that the law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the same obligation, and invested with the same authority, to preserve the peace of the King, as any other subject. If the one is bound to attend the call of the civil magistrate, so also is the other; if the one may interfere for that purpose, when the occasion demands it, without the requisition of the magistrate, so may the other too; if the one may employ arms for that purpose, when arms are necessary, the soldier may do the same. Undoubtedly the same exercise of discretion which requires the private subject to act in subordination to, and in aid of, the magistrate, rather than upon his own authority, before recourse is had to arms, ought to operate in a still stronger degree with a military force. But where the danger is pressing and immediate,—where a felony has actually been committed or

[a] *Vide* vol. 3, p. 52.

cannot otherwise be prevented, and from the circumstances of the case no opportunity is offered of obtaining a requisition from the proper authorities, the military subjects of the King, like his civil subjects, not only may, but are bound to do their utmost, of their own authority, to prevent the perpetration of outrage, to put down riot and tumult, and to preserve the lives and property of the people.

Still further, by the common law, not only is each private subject bound to exert himself to the utmost, but every sheriff, constable, and other peace officer is called upon to do all that in them lies for the suppression of riot, and each has authority to command all other subjects of the King to assist them in that undertaking. By an early statute, which is still in force (the 13th Henry IV. c. 7.) "Any two justices, together with the sheriff, or undersheriff of the county, shall come with the power of the county, if need be, to arrest any rioters, and shall arrest them, and they have power to record that which they see done in their presence against the law, by which record the offenders shall be convicted, and may afterwards be brought to punishment." And here I must distinctly observe, that it is not left to the choice or will of the subject, as some have erroneously supposed, to attend or not, the call of the magistrate as they think proper; but every man is bound, when called upon, under pain of fine and imprisonment, to yield a ready and implicit obedience to the call of the magistrate, and do his utmost in assisting him to suppress any tumultuous assembly. For in the succeeding reign, another statute was passed, which enacts, "That the King's liege people, being sufficient to travel, shall be assistant to the justices, sheriffs, and other officers, upon reasonable warning, to ride with them in aid, to resist such riots, routs, and assemblies, on pain of imprisonment, and to make fine and ransom to the King." In the explanation of which statute Dalton, an early writer of considerable authority, declares that the justices and sheriff may command, and ought to have the aid and attendance of all knights, gentlemen, yeomen, husbandmen, labourers, tradesmen, servants, and apprentices, and of all other persons being above the age of fifteen years, and able to travel.

In later times the course has been for the magistrates on occasions of actual riot and confusion, to call in the aid of such persons as they think necessary, and to swear them as special constables; and in order to prevent any doubt, if doubt could exist, as to his power to command their assistance by way of precaution, a recent statute, the 1st of G. 4. c. 37, has invested them with that power, in direct and express terms, when riot or felony is only likely to take place, or may reasonably be apprehended.

Again, that this call of the magistrate is compulsory, and not left to the choice of the party to obey or not, appears from the express enactment in that act—that if he disobeys, unless legally exempted, he is liable to the same fines, penalties, and punishments, as persons refusing to take upon them the office of constable were by law subject to.

But the most important provision of the law for the suppression of riots, is to be found in the statute 1 G. 1. s. 2. c. 5. by which it is enacted, that if any persons, to the number of twelve, or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, and being required or commanded by any one, or more, justice or justices, or by the sheriff, &c., by proclamation to be made in the King's name, and in the form stated in the act, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, shall, to the number of twelve, or more, notwithstanding such proclamation, unlawfully, riotously, and tumultuously, remain, or continue together, by the space of one hour after such command, or request, made by proclamation, then such continuing together shall be adjudged felony, and the offenders shall suffer death as felons.

Before I proceed to the consideration of the cases in the calendar, let me impress on the attention of all those who from idleness, curiosity, or mere thoughtlessness, suffer themselves to form part of a riotous and disorderly meeting, that they subject themselves unconsciously to the danger of punishment for crimes which they never contemplated; for where many are collected together in the prosecution of an illegal object, it is often impossible to discriminate between the active and the unoffending part of the mob; it requires evidence on the part of the accused, which they may not be able to produce, in order to defend themselves against the charge of participation in the guilt of others. The only safe course for the peaceable and well-disposed on all occasions of popular tumult is this—to lend their ready aid to assist the magistrates in suppressing it, or at all events forthwith to separate themselves from the others.

One class of cases likely to come before you will be founded upon the statute 7 and 8 G. 4. c. 30. s. 8, by which it is enacted, that "if any persons riotously and tumultuously assemble together to the disturbance of the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy any house, stable, coach-house, outhouse, warehouse, office, shop, mill, &c., every such offender is guilty of felony, and being convicted thereof, shall suffer death as a felon." In cases of this description you will consider whether the individual charged was one of the persons constituting a riotous assemblage which was effecting the destruction of the building. If he formed a part of such riotous assembly at the time the act of demolition commenced, or if he wilfully joined such riotous assembly, so as to co-operate with them, whilst the act of demolition was going on, and before it was completed, in either case he comes within the description of the offence, and within the penalties imposed by the act, although he may not have been a person who actually assisted by his own hand in the demo-

lition of the building. But the more numerous class of cases seems to be, that which is founded on the second section of the same statute, by which it is enacted, "that if any person shall unlawfully and maliciously set fire to any house or other building mentioned above, whether the same shall be in the possession of the offender, or in that of any other person, with intent thereby to injure or defraud any person, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon." In this offence you will perceive it is no constituent part of the description in the statute that the party charged should form one of a tumultuous or riotous assemblage for the disturbance of the public peace: it is an offence that may be committed by a single individual. You will therefore in this case inquire, first, whether the party set fire to the building himself: in such case no doubt of his guilt can exist; and if the proof falls short of this, you will then consider whether he was jointly engaged in the prosecution of the same object with those who committed the offence. If by his word or gesture he incited others to commit the felony; or if he was so near to the spot at the time that he by his presence wilfully aided and assisted them in the perpetration of the crime, in either of these cases the felony is complete, without any actual manual share in its commission; and where the statute directs that, to complete the offence, it must have been done with intent to injure or defraud any person, there is no occasion that any malice or ill will should subsist against the person whose property is so destroyed. It is a malicious act, in contemplation of law, when a man wilfully does what is illegal, and which, in its necessary consequence, must injure his neighbour; and it is unnecessary to observe, that the setting fire to another's house, whether the owner be a stranger to the prisoner, or a person against whom he had a former grudge, must be equally injurious to him. Nor will it be necessary to prove that the house, which forms the subject of the indictment in any particular case, was that which was actually set on fire by the prisoner. It will be sufficient to constitute the offence, if he is shown to have feloniously set on fire another house, from which the flames communicated to the rest. No man can shelter himself from punishment on the ground that the mischief which he committed was wider in its consequences than he originally intended.

Another class of offenders will be that of persons who stand charged with acts of plunder and theft; and these may come before you either aggravated by the circumstance of violence or threats to the person of the owner, or with the circumstance of a breaking into his dwelling-house, or stealing the property thereout when the house was already broken open. In both which cases the offence is considered of a more aggravated nature, and the measure of punishment is consequently more severe; or the facts may assume the shape of a simple larceny of the goods of another. In all of which cases, as in the case of arson before adverted to, all who are present, assenting to and co-operating in the act, are in point of law principal offenders.

The only other observation I would suggest is this,—that where property which has been stolen is found in the possession of any person recently after the theft committed, unless circumstances appear to rebut such presumption, he may be presumed guilty of the theft, until he can explain or prove his innocent possession of the property.

There is one case which stands in a different situation from the rest, and to which it may be proper that I should call your particular attention. I mean the case of one Lewis, who was at large upon his recognizance, but who has surrendered since, and who stands charged upon an inquest before the coroner with the offence of manslaughter, in shooting a boy of the name of Morris. It appears from the depositions before the coroner, that Lewis was acting in aid of the civil authorities, in assisting to clear the streets, after proclamation had been regularly made, requiring the rioters to disperse themselves, and after they had continued together for more than an hour from the time of making the proclamation. It appears also by the testimony of the witnesses, that the pistol was not aimed at the boy who was unfortunately struck by the ball. The nature, however, of the offence committed by Lewis will not depend so much upon that fact as upon the circumstances under which the pistol was originally discharged. If the firing of the pistol by Lewis was a rash act, uncalled for by the occasion, or if it was discharged negligently and carelessly, the offence would amount to manslaughter; but if it was discharged in the fair and honest execution of his duty, in endeavouring to disperse the mob, by reason of their resisting, the act of firing the pistol was then an act justified by the occasion, under the Riot Act before referred to, and the killing of the boy would then amount to accidental death only, and not to the offence of manslaughter.

AUSTIN'S PROVINCE OF JURISPRUDENCE DETERMINED.

[*Concluded from* vol. 3. *p.* 418.]

We shall now keep our promise, of giving some further extracts from the work of Mr. Austin.

The following notice of a limited monarchy is original.

"The infinite forms of aristocracy which result from these infinite modes, have not been divided systematically into kinds and sorts, or have not been distinguished systematically by generic and specific names. But some of those infinite forms have been distinguished broadly from the rest, and have been marked with the common name of limited monarchies. Now (as I have intimated above, and shall shew more fully here) the difference

between monarchies, or governments of one, and aristocracies, or governments of a number, is of all the differences between governments the most precise or definite; and in regard to the pregnant distinction between positive law and morality, incomparably the most important. And since this capital difference between one and a number is involved in some obscurity through the name of *limited monarchy*, I will offer a few remarks upon the various forms of aristocracy to which that name is applied.

"In all, or most of the governments which are styled limited monarchies, a single individual shares the sovereign power with an aggregate or aggregates of individuals: the share of that single individual, be it greater or less, surpassing or exceeding the share of any of the other individuals who are also constituent members of the supreme and heterogeneous body. And by that preeminence of share in the sovereign or supreme powers, and (perhaps) by precedence in rank or other honorary marks, that single individual is distinguished, more or less conspicuously, from any of the other individuals with whom he partakes in the sovereignty. But in spite of that pre-eminence, and in spite of that precedence, that foremost individual member of the mixed or heterogeneous aristocracy, is not a monarch in the proper acceptation of the term, nor is the mixed aristocracy of which he is the foremost member, a monarchy properly so called. Unlike a monarch in the proper acceptation of the term, that individual is not sovereign, but is one of a sovereign number. Unlike a monarch properly so called, that single individual, considered singly, lives in a state of subjection. Considered singly, he is subject to the sovereign body of which he is merely a limb. Limited monarchy, therefore, is not monarchy. It is one or another of those infinite forms of aristocracy which result from the infinite modes wherein the sovereign number may share the sovereign powers. And like any other of those infinite forms, it belongs to one or another of those three forms of aristocracy which I have noticed in the preceding paragraph. If the number of the sovereign body, the so-called monarch included, bear to the number of the community an extremely small proportion, the so-called monarchy is an oligarchy. If the same proportion be small, but not extremely small, the so-called limited monarchy is an aristocratical government (in the specific meaning of the name). If the same proportion be large, the so-called limited monarchy is a democratical or popular government, or a government of many.

"As meaning monarchical government limited by positive law, the name limited monarchy involves a contradiction in terms. For a monarch, properly so called, is sovereign or supreme; and, as I shall show hereafter, sovereign or supreme power is incapable of legal limitation, whether it reside in an individual or in a number of individuals. It is true that the power of an aristocracy, styled a limited monarchy, is limited by positive morality, and also by the law of God. But the power of every government being limited by those restraints, the name *limited monarchy*, as pointing at those restraints, is not a whit more applicable to such aristocracies as are marked with it, than to monarchies properly so called. And as the name is absurd or inappropriate, so is its application capricious. Although it is applied to some of the aristocracies wherein a single individual has the pre-eminence mentioned above, it is also withheld from others to which it is equally applicable. Its application indeed is commonly determined by a purely immaterial circumstance;—by the nature of the title, or the nature of the name of office, which the foremost member of the mixed aristocracy happens to bear. If he happen to bear a title which is commonly borne by monarchs in the proper acceptation of the term, the supreme government of which he is a member is usually styled a monarchy. Otherwise, the supreme government whereof he is a member is usually marked with a different name. For example: the title *βασιλευς*, *rex*, or *king*, is commonly borne by monarchs in the proper acceptation of the term: and since our own king happens to bear that title, our own mixed aristocracy of king, lords, and commons, is usually styled a limited monarchy. If his share in the sovereign power were exactly what it is now, but he were called protector, president, or stadtholder, the mixed aristocracy of which he is a member, would probably be styled a republic. And for such verbal differences between forms of supreme government, has the peace of mankind been frequently troubled by ignorant and headlong fanatics."

Mr. Austin, however, forgets the marked distinction between our "limited monarchy" and the republic of America—the hereditary right of our kings to the throne.

The following examination of some of the familiar political terms is clear and ingenious; and with this we shall close our selections.

"By the authors of the union between England and Scotland, an attempt was made to oblige the legislature, which in consequence of that union is sovereign in both countries. It is declared in the articles and act, that the preservation of the church of England, and of the kirk of Scotland, is a fundamental condition of the union: or, in other words, that the parliament of Great Britain shall not abolish those churches, or make an essential change in their structures or constitutions. Now so long as either nation shall regard its established church with love and respect, the abolition of the church by the British parliament would be an *immoral* act; for it would violate positive morality which obtains with the bulk of the nation, or would check opinions or sentiments which the bulk of the nation holds. Assuming that the church establishment is commanded by the revealed law, the abolition would be *irreligious*; or assuming that the continuance of the establishment were commended by gene-

ral utility, the abolition, as generally pernicious, would amount to a *sin*. But no man talking with a meaning, would call a parliamentary abolition of either or both of the churches, an *illegal* act. For if the parliament for the time being be sovereign in England and Scotland, it cannot be bound legally by that condition of the union, which affects to confer immortality upon those ecclesiastical institutions. That condition of the union is not positive law, but is counsel or advice offered by the authors of the union to future supreme legislatures. By the two examples which I have now adduced, I am led to consider the meaning of the epithet *unconstitutional*, as it is contradistinguished to the epithet *illegal*, and as it is applied to conduct of a monarch, or to conduct of a sovereign number in its collegiate and sovereign capacity. The epithet *unconstitutional*, as thus opposed and applied, is sometimes used with a meaning which is more general and vague, and is sometimes used with a meaning which is more special and definite. I shall begin with the former:—1. In every, or almost every, independent political society, there are principles or maxims which the sovereign habitually observes, and which the bulk of the society, or the bulk of its influential members, regard with feelings of approbation. Not unfrequently such maxims are expressly adopted, as well as habitually observed, by the sovereign or state. More commonly they are not expressly adopted by the sovereign or state, but are simply imposed upon it by opinions prevalent in the community. Whether they are expressly adopted by the sovereign or state, or are simply imposed upon it by opinions prevalent in the community, it is bound or constrained to observe them by merely moral sanction. Or (changing the phrase) in case it ventured to deviate from a maxim of the kind in question, it would not, and could not, incur a legal pain or penalty, but it probably would incur censure, and might chance to meet with resistance, from the generality or bulk of the governed. Now, if a law or other act of a monarch or sovereign member, conflict with a maxim of the kind to which I have adverted above, the law or other act may be called *unconstitutional* (in that more general meaning which is sometimes given to the epithet). For example: The *ex post facto* statutes which are styled acts of attainder, may be called *unconstitutional*, though they cannot be called *illegal*. For they conflict with a principle of legislation which parliament has habitually observed, and which is regarded with approbation by the bulk of the British community. In short, when we style an act of a sovereign an *unconstitutional* act (with that more general import which is sometimes given to the epithet), we mean, I believe, this: That the act is inconsistent with some general principle or maxim: that the given supreme government has expressly adopted the principle, or, at least, has habitually observed it: that the bulk of the given society, or the bulk of its influential numbers, regard the principle with approbation: and that since the supreme government has habitually observed the principle, and since the bulk of the society regard it with approbation, the act in question must thwart the expectations of the latter, and must shock their opinions and sentiments. Unless we mean this, we merely mean that we deem the act in question generally pernicious; or that without a definite reason for the disapprobation which we feel, we regard the act with dislike.—2. The epithet unconstitutional, as applied to conduct of a sovereign, and as used with the meaning which is more special and definite, imports that the conduct in question conflicts with *constitutional law*.

"And here I would briefly remark, that I mean, by the expression *constitutional law*, the positive morality, or the compound of positive morality and positive law, which fixes the constitution or structure of the given supreme government. I mean the positive morality, or the compound of positive morality and positive law, which determines the character of the person, or respective characters of the persons, in whom, for the time being, the sovereignty shall reside; and supposing the government in question, the aristocracy or government of a number, which determines moreover the mode wherein the sovereign powers shall be shared by the constituent members of the sovereign number or body. Now, against a monarch properly so called, or against a sovereign body in collegiate and sovereign capacity, constitutional law is positive morality merely, or is enforced merely by moral sanctions, though, as I shall show hereafter, it may amount to positive law, or may be enforced by legal sanctions, against the members of the body considered severally. The sovereign for the time being, or the predecessors of the sovereign, may have expressly adopted, and expressly promised to observe it. But whether constitutional law has been thus expressly adopted, or simply consists of principles current in the political community, it is merely guarded, against the sovereign, by sentiments or feelings of the governed. Consequently, although an act of the sovereign which violates constitutional law, may be styled with propriety *unconstitutional*, it is not an infringement of law simply and strictly so called, and cannot be styled with propriety *illegal*. For example: From the ministry of Cardinal Richelieu down to the great revolution, the king for the time being was virtually sovereign in France. But in the same country, and during the same period, the traditional maxim cherished by the courts of justice, and rooted in the affections of the bulk of the people, determined the succession to the throne. It determined that the throne, on the demise of an actual occupant, should invariably be taken by the person who might happen to be heir to it, agreeably to the canon of inheritance, which was named the Salic Law. Now, in case an actual king by a royal ordinance or law, had attempted to divert the throne to his only daughter and child, that royal ordinance or law might have been styled, with perfect propriety, an *unconstitutional* act. It would have conflicted with the traditional

maxim which fixed the constitution of the monarchy, and which was guarded from infringement by sentiments prevalent in the nation. But illegal it could not have been called; for inasmuch as the actual king was virtually sovereign, he was inevitably independant of legal investigation. Nay, if the governed had resisted the unconstitutional ordinance, their resistance would have been illegal, or a breach of the positive law, though consonant to the positive morality which is styled constitutional law, and perhaps to that principle of utility which is the test of positive rules."

NOTICES OF NEW BOOKS.

A Practical Treatise on the Law of Principal and Surety, particularly with relation to Mercantile Guaranties, Bills of Exchange, and Bail Bonds. By William Theobald, Esq. of the Inner Temple. Sweet and Stevens, 1832.

In our first and second volumes we were enabled, by the kindness of Mr. Theobald, to give notes of his Lectures on the Law of Principal and Surety. They have since been collected together and much enlarged and published in the above form. The author says he has been encouraged to publish them by "the favourable reception they received from the class, as well as some testimonies of approbation from friends who had read a brief sketch of them in the Legal Observer." As any eulogy from us might be liable to distrust, we can only refer our readers to the work itself; and we are well satisfied that there are few members of the profession who may not be instructed and benefited by its perusal.

A Digest of the Bankrupt Law, Part the First; comprising the Jurisdiction of the Court of Bankruptcy, as established by the Act 1 *and* 2 *W.* 4, *c.* 45. By Richard Bligh, Barrister at Law. Henry Butterworth, 1832.

There is scarcely any branch of the law in which we are so well supplied with text books as the Bankrupt Law. New Digests and Treatises appear every season; and as there is a considerable demand for them out of the strict limits of the profession, we suppose they all find some sort of sale. The establishment of a new Court gave a natural impetus to this class of works; and at the commencement of the year we had some difficulty in keeping pace with the press, which poured forth weekly some fresh publication on Bankruptcy. We believe, however, that we did succeed in giving our readers an account of every book on the subject, besides adding our mite ourselves. We have now another work on the Bankrupt Law, or at least a part of one, which we must shortly notice, or the printers will, for what we know, again get before us.

We have read Mr. Bligh's work with some attention, and think that it is written carefully and judiciously. Very few cases on the part of the subject treated upon are omitted, and still fewer mis-stated. Our only objection to it is, that it is hardly needed. The works of Messrs. Archbold and Deacon and Lord Henley, appear to us to supply the demand for the law of bankruptcy under the 6 G. 4, c. 16; and in the little book of Mr. Duncan Stewart, all the important changes under the late act are given. We are afraid, therefore, that there are not many persons who are not stocked almost to repletion, with books on the subject. If, however, any one is still neither "*lassatus*" nor "*satiatus*," we can recommend this little work to him.

GENERAL METROPOLITAN REGISTER BILL.

The following are some of the evils which will inevitably ensue on the passing of this Bill. They may be classed under the heads of *Exposure*, *Delay*, *Expense*, and *Vexation*.

1st. *Exposure.*—As the Bill requires the deposit of the original, or a full copy, of all deeds relating to Real Property hereafter to be executed, it is evident that the whole title of every man's property will eventually be lodged in the Register Office. The Bill neither does, nor can in the nature of things (although it affects to do it), provide any adequate guard against the inspection of these deeds by any person disposed thereto; so that the marriage settlements, family arrangements, mortgages (if any), and private affairs of every land owner, will henceforth be open to the search of every litigious or impertinent inquirer.

2d. *Delay.*—Transactions of every kind relative to Lands, would henceforth be attended with delay which neither the parties nor their agents could prevent. This would frequently be injurious, and sometimes ruinous; particularly with respect to temporary loans on sudden emergencies. A lender would no longer be safe in advancing his money on the

deposit of deeds, without first searching the Office for prior incumbrances, and registering a memorandum of the transaction. The delay, expense, and disclosure attending these processes would defeat the object of the temporary loan.

3d. *Expense*—The expenses incident to the institution would be a heavy and perpetually recurring charge on all owners and purchasers of real property, and would be in fact a tax imposed on *all*, for the protection of a few. Some idea of this may be conceived from what the Real Property Commissioners state in their second Report. They say, "We have been told that a search is rarely made at the present offices, except from the time of the last purchase or mortgage; that such a limited and inadequate search has for one title occupied a solicitor or his clerk more than ten days; that one search has cost upwards of 200*l.*; and that in some cases, where the estate has belonged to persons of very common names, the search has been considered impracticable." The advocates of the present Bill, propose a plan so perfect as to escape all these dangers, and so to simplify this *fifty-fold* machine (*viz.* England and Wales, as compared to Middlesex), as to bring all the expenses, including those of searches, to a very insignificant amount. But to whatever small amount, by skill and ingenuity, the expenses of registration may be reduced, they would still be an unmixed evil towards the owners of small properties; and with respect to small transactions, those would derive no corresponding benefit from the institution. It is capable of proof, that more than three fourths of all sales and mortgages that take place, are for sums at and under 300*l.* If there must be a registry at all, let it be confined to transactions above 300*l.*

4th. *Vexation.*—Whenever a General Register shall be in operation, parties dealing with lands, by mortgage, marriage settlement, sale, or otherwise, will no longer be able to effect their purposes amongst themselves and with the assistance of their own confidential law agents. Thenceforth they will be subjected to the surveillance, and to the insolence of office, of the *irresponsible* officers of Government;—for such they are expressly constituted by the Bill.

In a *political* point of view, also, this measure will be found highly objectionable.

1st. It is obvious that the Government, holding in its hands the control of every man's title, and knowing the value of every man's estate, so far as the consideration expressed in the last purchase deed will give the information, will be possessed of a formidable political engine; which in the hands of an arbitrary ministry, might be found a ready means of applying to the purposes of confiscation, feodal subjection, or general taxation. Example of this is not wanting in our history; and who knows but that such again may be the result of this newly projected Domesday Book?

2d. The Revenue will suffer an enormous defalcation in point of Stamp Duties; inasmuch as the various checks which will be placed in the way of the transfer of small properties, (three fourths of the whole, be it remembered,) will often amount to a prohibition.

3d. This already heavily taxed country will be burthened with the expense of erecting a stupendous building, and of maintaining an enormous establishment, in the shape of high salaried officers, &c.; for whether this expense is to be borne by the public at large, or by the purchaser and money borrower, in the shape of Fees, it will amount to pretty much the same thing. In either view it is a political evil.

The evils proposed to be remedied by a General Register, have been grossly exaggerated, both in number and magnitude, by some of the injudicious advocates of the measure. It has been calculated by various persons, that no actual loss occurs in one case of a thousand, for which the Register would have supplied a remedy. To this purpose the authority of the Commissioners will not be disputed. They declare in their Second Report, that "instances in which by fraud or mistake, lands are dealt with, without disclosing a prior conveyance, or charge, are found to be so rare, that the chance of such a concurrence of circumstances as would be necessary for a case of actual loss to arise, would be infinitely small." Strange, that after such a declaration, a General Metropolitan Register should have been thought necessary! And then, with regard to the expenses of conveyancing:—most of those may be got rid of by the several other bills for the amendment of Real Property Law brought in by Mr. Campbell, and by getting rid of what is called the "Lease for a Year," which Mr. Campbell has not attempted by the Registry Bill, or any other.

J. P.

SELECTIONS FROM CORRESPONDENCE.

No. VI.

ALLOWANCE TO WITNESSES IN CIVIL ACTIONS.

To the Editor of the Legal Observer.

Sir,

It may not be uninteresting to some of your readers to learn that the taxing officers of the Courts of King's Bench, Common Pleas, and Exchequer, have agreed to the following scale of allowances to witnesses for maintenance, &c. For travelling expenses, per mile, one way, 1*s.* to 7*s.* Common witnesses, such as labourers, journeymen, &c. per day, 5*s.* to 15*s.* Tradesmen, yeomen, and farmers, 10*s.* to 15*s.* Auctioneers and accountants, 1*l.* 1*s.* to 3*l.* 10*s.* 6*d.* Gentlemen, merchants, bankers, &c. if in London, 1*l.* 1*s.* only, with subpœna; if

at assizes, per day, 1*l.* 1*s.* Professional men, 1*l.* 1*s.* to 2*l.* 2*s.* Attorneys' clerks, 15*s.* to 1*l.* 1*s.*

H. B. A.

ATTORNEYS' OFFICE HOURS.

Sir,

The article inserted in page 325 of the 3d volume of your justly esteemed weekly publication, entitles you, as well as the writer, to the thanks of, and will no doubt be duly appreciated by, the class of persons for whose comfort it is meant to be promulgated.

The alterations in the hours of transacting business at the different public offices, which (with few exceptions) now close at three o'clock, instead of being open from eleven to one, and from four to six, as formerly, I consider alone as affording sufficient reason for adopting the suggestion of your contributor.

It will be obvious, these remarks apply more particularly to clerks filling responsible situations; and as I think an office should be kept open till seven o'clock, I should propose that assistant clerks should be required to give their attendance accordingly, which would answer every purpose of business in that respect. That an adoption of a general rule of this nature would be found as beneficial to the principals of offices as it would be grateful to their clerks to have the indulgence extended to them, I am fully satisfied. Z. A.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

PRACTICE.

A writ of ne exeat regno, *marked for* 6000*l. against a defendant, granted upon application of a plaintiff, describing himself a merchant residing within the jurisdiction, and having a claim beyond that sum, is discharged on the defendant making it appear that plaintiff was not a merchant, was residing out of the jurisdiction, and offered to take* 2000*l. in lieu of all demands.*

This was a motion to discharge a writ of *ne exeat regno* issued against the defendant, and marked for the sum of 6000*l.* The plaintiff in his application for that writ, described himself as residing in Sittingbourne, in the county of Kent. It appeared that so much was a false description; for the plaintiff was then, and for the last five years, residing in Boulogne, in France. The plaintiff had also described himself as a merchant, although he was not, and never had been a merchant. With respect to the amount claimed, also, it arose upon an unsettled account, and in the defendant's answer it was sworn that the plaintiff offered to accept a sum of 2000*l.* in discharge of all demands. But the grounds upon which the discharge of the writ was urged were chiefly, that the plaintiff was not residing in the jurisdiction of the Court, as he alleged, and was not a merchant. In the case of *Hyde* v. *Whitfield*, 19 Ves. Lord *Eldon* refused to grant a writ of *ne exeat regno*, because the plaintiff was not domiciled, within the jurisdiction, although he had correctly described his residence. His lordship believed that Lord *Eldon's* opinion as to the propriety of withholding the writ in that case remained unchanged; and, after much research, he was not able to find such writ was ever granted under such circumstances. There were cases, however, in which the same point of non-residence arose accidentally, and the writ was granted, which left it open to doubt whether, if the fact of non-residence had been the only objection, it would have prevailed conclusively. The writ had been granted by Lord *Lyndhurst*, in the case of the *King of Spain* v. *Machado*, although the plaintiff was notoriously and *ex necessitate* residing out of the jurisdiction. That noble and learned person's attention was called to the case of *Hyde* v. *Whitfield*; and that omission was particularly to be observed here. But there were also other objections here, besides residence abroad; and if all the facts which are now known had been brought before the Court, on the application for the writ, it would not have been granted marked for 6000*l.* Under all the circumstances, therefore, it was his opinion, that this writ must be discharged with costs; but in coming to that conclusion, he did not wish it to be understood that a writ of *ne exeat regno* should in no case be granted upon the application of a party residing out of the jurisdiction. —*Smith* v. *Wethersole*. Lincoln's Inn, March, 1832.

WILL.—PERPETUITY.

A devise of lands in trust, to be conveyed to A., with a clause disabling him from alienating the same, or any part thereof, and after his decease to his eldest son, with the like restraining clause, with like limitations to others, and in default of such issue to an eldest sister, in exclusion of younger branches: held to be a perpetuity; but in order to give effect to the testator's intent as near as the law would permit, the first person named in the will is to take a life estate, with remainder to the heirs of his body, and in default of issue to the eldest sister.

The *Lord Chancellor* gave judgment in this case, which, he said, was brought before this Court, for the purpose of establishing the will of Mr. John Cruickshanks, deceased, and carrying the trusts thereof into execution. The will directed that a plantation in the island of St. Vincent, with the slaves and other property thereon belonging to the testator, should

descend to Mr. Patrick Cruickshanks and his heirs, with a proviso nevertheless that he should not sell or otherwise alienate the estates, or divide them. The question raised here was upon the seventh clause of the will, and was one of considerable nicety, and was most ably argued at the bar. The testator, after referring to an estate which he possessed in Scotland, directed that the St. Vincent property should go to the same person that would hold the Scotch estate; and directed that the trustees of the will should transfer the same to the heir of the Scotch estate, namely, Patrick Cruickshanks, with a proviso to disable him from selling or otherwise disposing of all or any part thereof. The testator, in another part of his will, directed that these estates should descend entire to the eldest son of the said Patrick Cruickshanks; and, in default of male issue living at the time of his decease, to his eldest daughter, and in default of such issue, to the eldest sister, to the exclusion of the younger branches from any share therein. It was evident, that the testator intended by his will that these estates should descend to his heirs in perpetuity; and the question now for consideration was, how far this his intention could be carried into effect. In looking over the cases referred to upon this question, his lordship was of opinion that this case was of the same nature with that of *Humbuston* v. *Humbuston*, 1 P. Wms. 332, which was a case of executory trust, the testator intending to create a perpetuity, by directing his estates to be conveyed by his trustees to *A.* for life, and after *A.'s* decease to his (*A.'s*) first son for life, and afterwards to convey the same to the first son of *A.'s* first son for life, &c. The Lord Chancellor Cowper set aside that will, as far as it went to create a perpetuity; but ordered the conveyance of the estates to be made to the persons named in the will, as near the intent of the testator as the rules of the law would permit; that was, by making all the persons in being at the testator's decease, tenants for life, but the limitation to the sons unborn to be in tail. That was the course always adopted by this Court in like cases, as, for instance, in *Leonard* v. *The Earl of Essex*, 2 Vern. 526; and *Pitt* v. *Jackson*, 2 Bro. C. C. 51. His lordship said, that he did not see any reason for departing from these precedents; and he would, therefore, set aside the perpetuity, but would still preserve the will of the testator, as far as the rules of law would permit. He accordingly directed the estates to be conveyed to the plaintiff Patrick Cruickshanks for life, with remainder to the heirs of his body; and in default of such, then to his eldest sister, to the exclusion of the younger sisters.—*Cruickshanks* v. *Mackey*.—Lincoln's Inn. March 30th, 1832.

VICE CHANCELLOR'S COURT.

SPECIFIC PERFORMANCE.

A. suffers a recovery of certain estates, and conveys them to trustees, in trust, to sell, &c. from whom B. agrees to purchase them, but objects to complete the purchase on the grounds that there are judgment debts which accrued subsequent to the recovery suffered: Held, that these debts are no lien on the estates, and form no good ground of objection to the title.

This was a bill for specific performance of an agreement. The defendant agreed to purchase for 24,000*l.* certain estates from the plaintiffs, trustees of Mrs. S. Montague. Mr. Montague had suffered a recovery of the estates, and conveyed them to the plaintiffs upon trust to sell. He subsequently contracted judgment debts to a considerable amount—greater than the purchase money; and the defendant objected to complete his purchase upon the ground that the estates were liable to these debts.

Sir *Edward Sugden*, Mr. *Preston*, and Mr. *Wakefield*, for the plaintiffs, submitted, that these judgment debts were not a lien on the estates, nor were they to be paid out of the purchase money, as they were contracted subsequently to the recovery, and to the conveyance in trust to sell.

Mr. *Knight* and Mr. *Coote, contra*, submitted that the objection was properly made by the defendant, as the point was of importance to the purchasers of estates. The defendant was willing to complete the purchase upon having the opinion of the Court in favor of the title. The question was, whether the conveyance could be well made to the defendant while their judgment debts remained unsatisfied, and whether judgment creditors had not a right to pursue the purchase money, and prevent it from getting into the hands of the trustees.

The *Vice-Chancellor* was of opinion, that the objections taken by the defendant to the title could not avail. The intent of the trust was, that the trustees should sell the estates, convey them and receive the purchase money, and give their receipt for it. The judgment creditors in this case had nothing to do with these estates. He therefore decreed the defendant to complete the purchase; but as this was in the nature of an amicable suit, he would not make an order on him for costs.—*Lodge and another* v. *Lyslie*, March 29th. V. C.

KING'S BENCH.

[Before the Four Judges.]

CONSTRUCTION OF COVENANT.

Non-repair is not a sufficient breach to entitle a landlord to re-enter, on a proviso for re-entry, the words of which are, "shall do or cause to be done any act, matter or thing, contrary to and in breach of any one or more of the covenants or agreements herein before contained."

This was an action of ejectment on a proviso for re-entry contained in a lease by the lessor of the plaintiff to the lessee. It was tried at

the spring assizes, 1831, for the county of Surrey, before Mr. Baron *Bayley*. The plaintiff was nonsuited, with leave to set aside the nonsuit and enter a verdict in his own favour. The words of the proviso were the following: If the lessee, &c. "shall *do or cause to be done any act, matter or thing*, contrary to and in breach of any one or more of the covenants or agreements hereinbefore contained," the lessor of the plaintiff shall have a right of re-entry. One of the covenants was for repairing the premises; there were also covenants to pay rent, to insure, and to pay rates and taxes. The covenant alledged to have been broken was that for repair. The ground of the nonsuit was, that not repairing was not reached by the words "do or cause to be done any act, matter or thing." A rule for setting aside the nonsuit having been obtained,

Platt shewed cause. The words of the proviso are only applicable to commissions of acts, and not to mere permissions of some consequences to result To entitle the lessor of the plaintiff to recover, he must shew that some act has been done. The mere permission by the defendant of the premises to fall out of repair is not an act done, and therefore the lessor of the plaintiff is not entitled to recover.

Dowling, contrà.—The Court will give effect to the clear intention of the parties to this lease. No doubt can exist as to what was their intention. There may be acts of omission as well as acts of commission. A man is bound to obey the laws, to go to church, and *does* wrong in not doing so. In common parlance, the meaning of the words in the proviso will extend to the breach by non-repair. The word "act" has no technical meaning, and therefore must be governed by the same rules as common parlance. But the parties did not confine themselves to the word "act," but used the words "matter or thing," in addition. These words not only shewed, that the intention was that the word "act" should be construed in a liberal manner, but were of themselves an extension of the proviso. If they had not intended to extend the proviso, they would have used the word "act" only. If such a construction were not put on it, strange absurdities would follow. All the covenants which could only be broken by omission, would become surplusage. As, for instance, the covenants "to pay rent," "to insure," "to pay rates and taxes." These covenants would only be broken by omission. Therefore if the words of the proviso are construed as applying to breaches of commission only, and that such was the intention of the parties, the landlord intended to let the tenant into possession, and to permit him to retain possession, without payment of rent, taxes or rates, or effecting insurance; and, moreover, intended to waste so much parchment by introducing so many useless words, containing so many nullities in the form of covenants. The case was different from that of *Doe* d. *Spence* v. *Godwin and others* (4 M. & S. 265). There such an inconsistency existed between the language of the proviso and the supposed intention of the parties, that the Court would not give effect to the supposed intention. But here no inconsistency existed, and none could be supposed to exist, without reading the words in a most unusual manner, and attributing to them a meaning, which it was absurd to suppose the parties intended. The words here properly point to negative covenants. Now, in *Doe* d. *Paine* v. *Marchetti* (1 B. & Adol. 715), which was an action of ejectment on the proviso for re-entry, the words of the proviso for re-entry were, if the tenant should *make default* in any of the covenants for the space of thirty days after notice. The breach assigned was the building of a portico. It was there holden, that that was not a breach of the covenant, since it was not such a default as thirty days notice not to make it could be given. Lord *Tenterden* then said, "to make default in performance, seems properly applicable to affirmative covenants; though I believe there have been cases where the expression 'make default' has been applied to negative ones also." Mr. Justice *Littledale* also observed, "A covenant to repair, which though in its nature negative, is also of an affirmative nature." The words "make default" properly applied to affirmative covenants, yet would be construed to extend to negative covenants. By parity of reasoning, I contend, that the words "do or cause to be done any act, matter or thing, contrary to and in breach of the covenants or agreements hereinbefore contained," which are of a negative nature, may be extended to affirmative ones; of which class the covenant to repair is. But, whatever doubt may be supposed to exist on the bare construction of the proviso, by referring to the covenant for quiet enjoyment, all doubt will cease. That covenant is for quiet enjoyment of the premises, on condition of the performance of "all and every the covenants," &c. "according to the true intent and meaning of these presents." The meaning of these words is, that on the breach of any one of the covenants, the landlord's covenant for quiet enjoyment shall be at an end. For reading the covenant for quiet enjoyment with the other parts of the lease, the before cited case of *Doe* d. *Spence* v. *Godwin and others*, is an authority. Lord *Ellenborough* there said, "the covenant for quiet enjoyment is, that the lessee paying the rent, and performing the covenants hereinbefore contained, shall quietly enjoy, &c.; and the proviso for re-entry for non-performance of covenants is, if all or any of the covenants *hereinafter* contained shall be broken, &c. As these two covenants respect the period of enjoyment of the estate, I incline very much to construe them together, and as relating to the same covenants, in which case *hereinbefore* in the one would be inconsistent with the *hereinafter* in the other, and I should reject *hereinafter*, upon the rule of *ex antecedentibus et consequentibus optima est constructio*. But, on the other hand, if the plaintiff had declared upon this lease, and set it out without the word *hereinafter*, or substituting *hereinbefore* in its place, I am afraid, on *non est factum*, he must have been nonsuited

Without professing then to be free from considerable doubts, I think the safest course is to give effect to this instrument according to its letter, particularly as this is only a nonsuit." If there had been no inconsistency between the covenant for quiet enjoyment and the proviso for re-entry, Lord *Ellenborough* would have set aside the nonsuit. Here there is no inconsistency, and therefore the plaintiff must be intitled to recover. Now, suppose the tenant were ousted from his possession, would he, not having repaired, be enabled to maintain an action against his landlord on the covenant for quiet enjoyment? I submit he could not. Because he must shew that he had performed all the covenants contained in the lease; and that he could not do. Then if he could not recover against his landlord, on the covenant for quiet enjoyment, not having repaired, how can he successfully defend the present ejectment? If he can, then he has title and no title under the same instrument.

Cur. adv. vult.

Lord *Tenterden*, C. J.—We think, that the words of the proviso for re-entry in this case refer only to acts of commission. Consequently, the non-repair of the premises does not work a forfeiture.

Rule discharged.—*Doe* d. *Abdy* v. *Jeapes*, January 16th, 1831. K. B.

PRACTICE.—CONCURRENT WRITS.—AC ETIAM.

The omission of a return day in the precipe for a bill of Middlesex is not an irregularity.

If a fi. fa. *on a judgment have been executed, but not returned, and the defendant is arrested in an action on the judgment, the Court will not set aside the arrest.*

If an ac etiam *is in assumpsit, and the affidavit to hold to bail is in debt, the Court will discharge the defendant on putting in bail to the amount of* 40*l.*

Campbell shewed cause against a rule calling on the plaintiff to shew cause why all proceedings should not be set aside for irregularity, with costs to be taxed by the Master, or why the bail bond given to the sheriff should not be delivered up to be cancelled, on filing common bail, and that in the mean time proceedings be staid. The facts were the following:—In Michaelmas Term, 1829, the plaintiff recovered a judgment against the defendant for 3,372*l.*; and in May, 1832, the plaintiff issued a *fi. fa.* directed to the sheriff of the county of Worcester, against the goods of the defendant. The sheriff entered into possession, and having remained there some time, was informed that the furniture belonged to another person. He then retired. In December, 1830, the plaintiff sued out another *fi. fa.* directed to the sheriff of Middlesex, and under it defendant's goods were seized, to the amount of 68*l.* and upwards. Neither of these writs of *fi. fa.* were returned. On the 20th of March, 1832, the defendant was arrested on a bill of Middlesex, for a sum of 1800*l.* and upwards, sworn to be due on the judgment recovered. The *ac etiam* stated the money to be due "on promises." In the *precipe* for the bill of Middlesex no return day was mentioned.—The objections on the other side, to the plaintiff's proceedings, were threefold: First, it was said that the *precipe*, not mentioning any return day, was irregular. That was no objection, because the statement of the return was only instruction to the officer as to the day when the writ was to be returned. Secondly, it was contended, that the writs of execution not having been returned, after a levy had been made, before the bill of Middlesex issued, that writ was irregular: but if enough to satisfy the judgment had been levied, that might be pleaded as an answer to the action. Thirdly, it was objected that the affidavit disclosed a cause of action, which if it existed must be in *debt*, but the process was in *assumpsit*. This objection was premature. The plaintiff had not declared, therefore no variance could as yet appear.

White, in support of the rule. With respect to the want of a return to the *precipe* for the bill of Middlesex, it is necessary there should be a *precipe*, and this being an imperfect one, it is the same as if there were no *precipe* at all. He cited *Wadworth* v. *Allen*, 1 Chit. Rep. 186.

Lord *Tenterden*, C. J.—No doubt there must be a *precipe*, but the introduction of the return is a mere direction to the officer. If the plaintiff wishes the writ to be returned on a particular day, he states it to the officer; but if not, the officer makes it returnable according to the course of the office. There is nothing in that objection.

White.—With respect to the second objection, I find no case in which it has been expressly decided that an arrest on a judgment after a *fi. fa.* has issued but not returned, is irregular. But there are various cases in which the Court have holden that a *ca. sa.* cannot be issued after a *fi. fa.* has been issued, until the latter writ has been returned. In *Lawes* v. *Codrington*[a], the marginal note is this, "Where a *fi. fa.* has issued and a levy less than the plaintiff's debt has been made, a *ca. sa.* cannot issue till after the return day of the *fi. fa*, although, in fact, the sheriff has made a return to it, and the *ca. sa.* recites the writ and the sheriff's return." The judgment of Mr. Justice *Parke* in that case, is this: "If you execute the *fi. fa.* you cannot take another step till the following term, for that writ cannot be returned into Court until the Court in contemplation of law is sitting."

Parke, J.—There the defendant could not have pleaded the fact of the levy. But here, you may plead it as a good defence to the action, if the whole debt has been levied, or a defence so far as the sum levied extends. We therefore, in such a case, are not in the habit of interfering summarily.

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[a] 1 Dowling's Prac. Rep. 30.

White.—But, on principle, there is no distinction. In *Lawes* v. *Codrington*, if the *ca. sa.* had issued for a greater sum than the residue of the debt, after deducting the sum levied, the defendant might have had an *audita querela*. The Court, in several cases, is in the habit of granting relief on summary application, when the ground of the application may be pleaded; as, for instance, in the case of a *feme coverte* being arrested. In further support of the second point, he cited *Wilson* v. *Kingston*, 2 Chit. R. 203; *Miller* v. *Parnell and another*, 2 Marsh. 78; 6 Taun. 370, S. C. Then, with respect to the third point, that a variance existed between the affidavit of debt and process, Mr. Tidd laid it down, "that the affidavit to hold to bail must correspond in substance with the process." For this statement he cited 1 Chit. Rep. 659. Here the affidavit is in *assumpsit*, and the cause of action is in *debt*. This variance cannot be cured by the declaration. The defendant would be in no better situation by waiting until the plaintiff had declared. The present application, therefore, is not premature.

Follett followed on the same side.

Lord *Tenterden*, C. J.—I think there is nothing in the objection that this action should not have been commenced until after the return of the *fi. fa.* It would have been necessary that the *fi. fa.* should have been returned before a *ca. sa.* could have issued; but not returning it is no ground for setting aside the proceedings as irregular. The defendant may plead the fact of a certain sum having been levied, and may, according to its amount, give a complete or partial answer to the action. As to the objection, that the *ac etiam* does not correspond with the affidavit to hold to bail, I think that he is intitled to be discharged on putting in bail to the amount of 40*l.*, as there was in fact no *ac etiam*.

Littledale, J. concurred.

Parke, J. concurred, and observed, that by "the new Rules of Hilary Term,[c] where there is no *ac etiam* when the defendant is arrested, shall not be deemed ground for discharging the defendant or the bail; but the bail bond, or recognizance of bail shall be, to sue with a penalty or sum of 40*l.* only." The defendant must therefore be discharged, on putting in bail to the amount of 40*l.* only.

Puttison, J. concurred.

Rule absolute for discharging the defendant out of custody, on putting in bail to the amount of 40*l.* *Green* v. *Elgie*. E. T. April 26th, 1832. K. B.

JUDGMENT AS IN CASE OF NONSUIT.

Addison shewed for cause against a rule for judgment as in case of nonsuit, that the defendant having only ruled the plaintiff to enter the issue in that term, the plaintiff could have made no default in trying his issue at the next assizes after its entry, so as to enable defendant to take down the case by proviso; and cited Tidd. 9th ed. 760.

Tyrwhitt, in support of the rule, denied the application of the above to judgments as in case of nonsuit, which he said might by the practice be moved for at any time after the issue entered by the plaintiff, which was generally done on being ruled by the defendant; and *Parke*, J., after consulting the Master, was of this opinion. The rule was afterwards discharged on a peremptory undertaking. *Tapley* v. *Wainwright*, Jan. 28th, 1832. K. B.

The above case seems the foundation of Reg. Gen. 2 W. 4. No. I. § 71.

NISI PRIUS.

COURSE WHERE A WITNESS DOES NOT ATTEND.

When this cause was called on, but before swearing the jury, Mr. *Tyrwhitt*, counsel for the plaintiff, desired a witness to be called on his *subpœna*, in order that, if he was absent, the cause, which had been called out of its turn as undefended, might be restored to its place in the cause paper.

Taunton, J., at first objected to this course, suggesting that the witness could not be proceeded against unless the jury were sworn and the plaintiff submitted to a nonsuit for want of his evidence. But *Hopper* v. *Smith*, Moody & M.'s Reports, 115, and *Barrow* v. *Humphreys*, 3 Bar. & Ald. Rep. 598, being in point in support of the application, the witness was called on his *subpœna*. On his non-appearance the jury was not sworn, and the cause was set down to be heard on next Friday. *Aitkens* v. *Howell*, Guildhall, May 10th.[a]

ERRATUM.—In the *placitum* to the case of *Oldham* v. *Eborell*, p. 27, *ante*, for "neglected," *read* "defeated."

NOTES OF THE WEEK.

House of Lords.

COMMON LAW COURTS PROCESS.

This bill has been returned from the Commons, and agreed to.

CONTEMPTS IN ECCLESIASTICAL COURTS—LUNATICS — PRESCRIPTION — PRESCRIPTION (TITHES)—ANATOMY.

These bills wait for the second reading.

SENTENCE OF DEATH—REMEDIES AGAINST THE HUNDRED.

These wait for Committees.

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[c] See 1 Reg. Gen. H. T. 3 L. O. 224.

[a] This case may be useful as a practical point, not universally assented to, but which is Lord *Tenterden's* usual practice at *Nisi Prius*, in like cases.

CONTEMPTS IN EQUITY.

This Bill waits for the third reading.

House of Commons.

ARBITRATION.

The Committee on this Bill is deferred.

WITNESSES IN EQUITY — INSOLVENT DEBTORS.

The second reading deferred.

STATUTE OF FRAUDS AMENDMENT—ATTESTATION OF INSTRUMENTS.

The second reading deferred till Monday the 28th of May.

BANKRUPT ACT AMENDMENT—CORONERS.

The committees on these Bills deferred.

LUNATICS' COMMISSIONS—EXCHEQUER COURT OFFICERS.

The second reading deferred.

JUDGES' SALARIES.

Mr. John Wood has deferred his motion to reduce the salaries of the two Chief Justices, on any vacancy, till the 23d inst.

INCORPORATED LAW SOCIETY.

A special general meeting of the members of this society was held at their Hall in Chancery Lane, on Tuesday last the 15th inst., when upwards of a hundred and fifty members were present. After hearing the Report of the Committee of Management, the meeting resolved upon the Common Seal of the Society.

The Bye-Laws, Rules, and Orders, were then read. Mr. Frere (the Chairman), Mr. White, Mr. Foss, Mr. Tooke, Mr. Spence, Mr. Wilde, Mr. Hamilton, Mr. Sweet, Mr. Browne, Mr. Bower, Mr. Lawrance, Mr. Loaden, and Mr. W. S. Jones, addressed the meeting, and the further consideration of the subject was adjourned for a fortnight, at the same time and place.

This adjournment will prevent the opening of the Institution until after the commencement of the ensuing Term; as the amount of the annual subscription, the use of the various departments of the building, and the details of management, depend on the Bye-Laws.

We understand that numerous donations of books have been recently made to the Library, many of them of considerable value. Several sums of money have also been contributed.

CHANCERY SITTINGS.

SEAL AND PETITION DAY.

[TRINITY TERM, 1832.]

BEFORE THE LORD CHANCELLOR.

At Lincoln's Inn.

Thursday	May 24	The Seal before Term.
Friday	25	Petition Day.

At Westminster.

Saturday	26	Motions.
Monday	28	Appeals.
Tuesday	29	King Charles's Restoration—Holiday.
Wednesday	30	Re-hearings & Appeals.
Thursday	31	Ascension Day. Holiday
Friday	June 1	Motions.
Saturday	2	Re-hearings & Appeals.
Monday	4	
Tuesday	5	
Wednesday	6	
Thursday	7	Motions.
Friday	8	Re-hearings & Appeals.
Saturday	9	
Monday	11	
Tuesday	12	
Wednesday	13	
Thursday	14	
Friday	15	
Saturday	16	Motions.

BEFORE THE VICE CHANCELLOR.

At Lincoln's Inn.

Thursday	May 24	The Seal Day.
Friday	25	Petitions.

At Westminster.

Saturday	26	Motions.
Monday	28	Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Tuesday	29	King Charles's Restoration—(Holiday).
Wednesday	30	Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Thursday	31	Ascension Day. Holiday
Friday	June 1	Motions.
Saturday	2	Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Monday	4	
Tuesday	5	
Wednesday	6	
Thursday	7	Motions.

Friday	-	8	Pleas, Demurrers, Exceptions, Causes, and Further Directions.
Saturday	-	9	
Monday	-	11	
Tuesday	-	12	
Wednesday	-	13	
Thursday	-	14	
Friday	-	15	Short Causes and Ditto.
Saturday	-	16	Motions.

MINOR CORRESPONDENCE.

BANKRUPTCY COURT—COSTS.

It would be an improvement on the New Bankruptcy Act, were the petitioning creditor made responsible for the payments to the Court as well as for the solicitor and messenger's bills.

As the law now stands, if the assets are insufficient to answer these primary calls of the Court, both it and the official assignee have no means of being recompensed for their labour—a result which the legislature never could have contemplated.

The alteration suggested as above, trivial as it may seem, would add greatly to the respectability of the New Court, by clearing it of a class of persons who now make use of it instead of applying to the Insolvent Debtors' Court. A. Z.

ANSWERS TO QUERIES.

COMMON LAW.

WILL.—REPUBLICATION. VOL. III. P. 411.

Whether a will, which is revoked by another, is set up by the destruction of the second, has long been *vexata quæstio* in the Courts. It was held by Sir *George Leigh* that the cancelling of the second will did not set up the first. *Ex parte Hellier*, 3 Atk. 797. Lord *Mansfield*, however, decided, that if a testator makes one will, and does not destroy it, though he makes another, virtually and expressly revoking the former, and afterwards destroys *the revocation*, the first will is still in force and good. *Harwood* v. *Goodright* d. *Rolfe*, 1 Cowp. 87. In the case of *Moore* v. *Moore*, 1 Phill. 375, this important question was fully considered. It was decided by Sir *John Nicholl*, and his judgment was affirmed in the Court of Appeal, that in the case then before the Court, the cancellation of a second will did *not revive* a prior will, though of nearly similar import. In the Court of Delegates, Lord *Tenterden* said, "If it was put as an absolute proposition, that the cancelling of the second will would revive the first, cases might be put so distressing as to make me feel a little whether it was right." See also *Kirkudbright's case*, 1 Hagg. 326. The result of a comparison of all the cases appears to be, that the presumption, at common law, is in favour of a revival; and the presumption, in the Ecclesiastical Courts, is against a revival; but that either presumption may be rebutted by circumstances. The case of *Hooker* v. *Head*, 3 Phill. 26, has confirmed the doctrine, that the revival of a former will is to be considered as a *question of intention*. See also *Lasky* v. *Jackson*, 3 Phill. 134. G. W.

STOLEN NOTES. VOL. III. P. 411.

According to the decision of the Court, in the case of *Strange* v. *Wigney*, 4 M. & P. 470, I think the holders of both notes mentioned by M., would be able to recover the amounts against the bank, supposing the facts stated could be satisfactorily proved.

R. M.

EXECUTOR.—CREDITORS. VOL. III. P. 411.

It is the duty of executors to discharge all debts due by specialty, before simple contract debts are paid; and if they do not so, they are guilty of *devastavit*. Went. Ex. 302. But it does not appear to be their duty to inform creditors of their right of priority, as I apprehend both parties are equally supposed to be aware of the rights of the other; and the rule "*Ignorantia juris non excusat*," would be considered as applicable on both sides. Under such circumstances, I incline to think no Court would set aside an agreement executed (not executory), and render an executor personally liable to the balance of a specialty creditor's debt, when settled in the manner stated.

R. M.

EVIDENCE.—ILLEGITIMACY. VOL. III. P. 428.

The case which approaches nearest to that put by J. P., is *Rex* v. *Reading*, Rep. temp. Hard. 82. It was an appeal against an order of bastardy, in the case of a *feme covert*, and Lord Hardwicke and the other judges decided that she was a competent witness to prove connexion with the appellant, though her husband was interested both in the question and result of appeal. It has also been held, that in all cases in which the wife can give evidence for her husband, she is equally competent to give evidence against him; *Gibbs*, C. J., in *Rex* v. *Perry*; and *Abbot*, C. J., in *Rex* v. *Serjeant, et al.* 1 Ry. and Mo. 354. The decision in *Rex* v. *Inhabitants of Cliviger*, 2 T. R. 263, appears to favor the above view of the case. R. M.

GAME LAWS.

FRESH PURSUIT. VOL. III. P. 428.

The words of the section quoted by A. E. I., are clear enough, *viz.* that the provisions shall not extend to cases of *fresh pursuit of any hare already started upon any other land*; or, in other words, that if the hounds are once at fault, but recover the scent of the same hare, they may pursue her; but if *another* hare is found, she may not be followed, without sub-

jecting the sportsman to the provisions against trespassers. I should imagine, the lands may be drawn, or there could be no fresh pursuit, except by accident; but no other hare pursued, if started. With regard to the expression "any person," I think it would be held to imply "any *authorized* person;" other parts of the same act having expressly declared who may sport. R. M.

QUERIES.

COMMON LAW.

ACTION ON BOND.

A. gives a bond to *B.* for 200*l.* Interest is regularly paid up to *A.*'s death, which happens thirty years after the execution of the bond. *A.*'s executors refuse to pay the amount of *B.*'s bond, alleging that the bond is not valid after the expiration of twenty years. Can *B.* prosecute an action against the executors, for the recovery of the 200*l.*? C. S.

EXECUTOR.—RESIDUE.

After payment of all the debts, and satisfaction of the legacies contained in the will of the deceased (who died without relations), there remains a considerable overplus in the hands of the executor undisposed of (no residuary legatee being appointed). Will such executor be entitled to take the property? There is no specific legacy bequeathed to him by the will. R. B.

INSURANCE.—BROKER'S BANKRUPTCY.

An insurance broker effects an insurance on a ship for *A. B*, the owner. The ship is lost. Some time before the expiration of the month allowed to pay the loss, the underwriters settle their loss with the broker, and the following day the broker fails. The owner, *A. B.*, then gives notice to the underwriters, and demands payment. Can he compel them to pay him? or is the settlement with the broker binding on him? R. M.

LAW OF PROPERTY AND CONVEYANCING.

DEVISE.—PERSONALTY.

A. B., by his will, after reciting that he had sold and disposed of a freehold estate, devises the same to his executors, upon trust to convey the same to the purchaser on receipt of the purchase money, and to stand possessed of such purchase money, upon certain trusts therein mentioned. Is the purchase money of the estate, so contracted to be sold by the testator in his lifetime, to be considered as part of the personal assets of the testator, and liable to the probate duty, as well as the legacy duty? W. W.

MISCELLANEA.

INSTRUMENTS OF TORTURE.

The *rack* was a large open frame of oak, raised three feet from the ground. The prisoner was laid under it on his back on the floor; his wrists and ancles were attached by cords to two collars at the ends of the frame; these were moved by levers in opposite directions, till the body rose to a level with the frame. Questions were then put, and, if the answers did not prove satisfactory, the sufferer was stretched more and more till the bones started from their sockets.

The *scavenger's daughter* was a broad hoop of iron, so called, consisting of two parts, fastened to each other by a hinge. The prisoner was made to kneel on the pavement, and to contract himself into as small a compass as he could. Then the executioner, kneeling on his shoulders, and having introduced the hoop under his legs, compressed the victim close together, till he was able to fasten the extremities over the small of the back. The time allotted to this kind of torture was an hour and a half, during which time it commonly happened, that from excess of compression the blood started from the nostrils; sometimes, it was believed, from the extremities of the hands and feet.

Iron *gauntlets*, which could be contracted by the aid of a screw. They served to compress the wrists, and to suspend the prisoner in the air, from two distant points of a beam. He was placed on three pieces of wood, piled one on the other, which when his hands had been made fast, were successively withdrawn from under his feet. "I felt," said F. Gerard, one of the sufferers, "the chief pain in my breast, belly, arms, and hands. I thought that all the blood in my body had run into my arms, and began to burst out of my finger ends. This was a mistake; but the arms swelled, till the gauntlets were buried within the flesh. After being thus suspended an hour, I fainted, and when I came to myself, I found the executioners supporting me in their arms; they replaced the pieces of wood under my feet; but as soon as I was recovered, removed them again. Thus I continued hanging for the space of five hours, during which I fainted eight or nine times."

A fourth kind of torture was a cell called "*little ease.*" It was of so small dimensions, and so constructed, that the prisoner could neither stand, walk, sit, nor lie in it at full length. He was compelled to draw himself up in a squatting posture, and so remain during several days.—*Dr. Lingard's History.*

The Legal Observer.

VOL. IV. SATURDAY, MAY 26, 1832. No. LXXXIV.

"Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

THE RESULTS OF THE LATE CHANGES.

THE temporary secession of the present ministry has had at least the effect of convincing those who were not before convinced, that the great measure of the day must become the law of the land. It has had another great effect—good or bad, as our readers may choose to think it: it has elicited some very important opinions as to *law-reform* from the present Law Officers of the Crown and others. These it will be proper to mention.

On Saturday the 12th instant, the Lord Chancellor, on addressing the Court of Chancery on his supposed retirement, made two important declarations. He said that if he had continued in office, he should certainly, without having recourse to Parliament, have accomplished the important and almost necessary plan, of the three heads of the equitable jurisdiction sitting together, to form, for a large branch of the business, a complete Court. It was no fault of his that this salutary improvement had not been made. He trusted he should live to see it effected. We have repeatedly reflected on this change (which the Lord Chancellor has an unquestionable power to effect without legislative authority) since it was first proposed, and we cannot see that any objection can be made to it. It must always be necessary, that either the Master of the Rolls or the Vice Chancellor should sit for the despatch of motions and petitions. And if the business is not kept under, as it has been of late, it will still be found necessary to have two Judges at least, to hear original causes; but if the arrear can be kept down, (and, the bankruptcy business having been removed, this is not unlikely), it would be of obvious advantage that all causes should be heard by the three equity judges, instead of by one, as at present. The Lord Chancellor has already, to a certain extent, acted on this plan, and, we believe, in every case with a satisfactory result.

But the Lord Chancellor also adverted to an intended change even more important, and, until now, unproposed by him, as we believe, since he has held the seals. He mentioned it "as more important, but attended with far greater difficulty, yet he hoped to see it brought about. His opinion was well known, especially by his colleagues, to be of some standing, that every effort should be made to remove the great incongruity with the fundamental principles of our judicial establishment which the Court of Chancery presents; and he trusted that the time would ere long come, when the highest judicial duties of our civil tribunals would cease to be mixed with political functions." This is not perfectly plain in its terms, but we conceive it can only point to the separation of the duties of the first Equity Judge from those of a Cabinet Minister. We have long intended to take up this subject, and we now only allude to it as wishing to record the important opinion on it which we have just stated; we shall soon consider it at length, which we have been long prepared to do.

These are the declarations of the Lord Chancellor. Hardly less important is that of the Attorney-General, who has mentioned his intention of bringing in a bill for the abolition of the punishment of death for the crime of forgery. According to the tables

given in Mr. Wakefield's book [a] on the Punishment of Death, there were, from the 1st of May 1827, to the 30th of April, 1830, thirty-five persons committed for forgery,—of whom two were not prosecuted, ten acquitted, and twenty convicted;—of these twenty, only six were executed. This shews pretty plainly, that a person accused of this crime stands a very good chance of being acquitted; and, if he be convicted, of not having the sentence of the law carried into effect. Under these circumstances, we think that the time has come when some alteration must be made.

By the 1 W. 4, c. 66, as our readers will remember, the punishment of death was repealed as to the offence of forging bonds, deeds, and receipts for money, and the penalty is now almost solely confined to the forgery of bills, notes and negotiable instruments, transfers of stock, debentures, orders, warrants for money, and wills.

Another important event of the last week is a motion made by Mr. John Wood, for a return of the salaries of the Judges of the Courts of King's Bench, Common Pleas, and Exchequer, together with the salaries, fees, and emoluments of the clerks, marshals, associates, and other officers, distinguishing such part of the fees, if any, as are accounted for by the said officers to the said Judges. We confess that we do not see the necessity for any reduction of the salaries of the Chief Justices and Chief Baron; but we could have wished that the latter part of the motion had been a little more comprehensive. We wish to know when it is, and who will be the member, who will move for a return of the fees paid to the legal sinecurists, under one name or other. We also wish for returns as to the fees paid to the Lord Chancellor's officers. The salary of the Secretary of Bankrupts has lately been fixed and limited by act of Parliament. We shall be glad if this course is pursued respecting the other Secretaries and officers of the Chancellor. We sincerely hope that Mr. Wood, for no more fit member can be found, will take up all these subjects, and lay them before the public.

These then are the results of the recent temporary retirement; and be it our duty to prevent these enquiries from fading away before the public attention, or their proposers. Let our readers be sure that the time for Law Reform is daily approaching nearer.

[a] p. 47.

NEW BILLS IN PARLIAMENT.

A BILL INTITULED, "AN ACT FOR THE BETTER REGULATION OF THE DUTIES TO BE PERFORMED BY THE OFFICERS ON THE PLEA OR COMMON LAW SIDE OF THE COURT OF EXCHEQUER.

RECITING, That an act was passed in the first year of the reign of his present Majesty, intituled, "An Act for the more effectual Administration of justice in England and Wales," and by the said act certain changes were made on the plea or common law side of the Court of Exchequer: And reciting, that William Stewart Rose, Esquire, now is Clerk of the Pleas in the said Court, and is lawfully entitled to execute the said office by himself or his sufficient deputy, during the term of his natural life, and Thomas Dax, Esquire (commonly called the Master), now is Deputy Clerk of the Pleas, and Stephen Richards, Kenrick Collett, Edmund Walker and George Chilton, Esquires, are the four sworn clerks in the said Court; and the said Thomas Dax, Stephen Richards, Kenrick Collett, Edmund Walker, and George Chilton are the five principal officers of the said Court: And reciting, that the business in the offices on the plea or common law side of the said Court has greatly increased, and the same since the passing of the said act has been conducted and performed by the said Deputy Clerk of the Pleas and the said four sworn clerks, but without any regulation as to the respective duties to be performed by each; and many of the duties of the Master have from necessity been performed by the sworn clerks, but without any obligation upon them to perform such duties; and reciting, that it is expedient to apportion such business among the said officers, and to fix and determine the duties to be performed by them respectively: It is therefore proposed to be enacted, That from and after the commencement of the act, there shall continue to be five principal officers on the plea side of the said Court (exclusive of the said William Stewart Rose, Esquire, the said Clerk of the Pleas), and no more; and that the said Thomas Dax, Stephen Richards, Kenrick Collett, Edmund Walker and George Chilton, Esquires, who have so conducted the business on the plea side of the said Court, and their successors, shall from and after the passing of this act, perform the same as follows; that is to say, the said Thomas Dax, Kenrick Collett, and Edmund Walker, shall perform the duties of Master and Prothonotary, the said Stephen Richards the duties of Clerk of the Rules, and the said George Chilton the duties of Filazer of the said Court, and the said officers shall be styled and designated accordingly; and if any doubt or difference shall at any time arise respecting the duties to be performed by the said respective officers, the same shall be settled and determined by the Lord Chief Baron and the other Barons of the said Court for the time being.

That such officers and their successors shall

hold their said offices during good behaviour, and shall and may, in and for the discharge of the duties of their respective offices, have such assistants and clerks as the Lord Chief Baron and the other Barons of the said Court for the time being shall determine to be necessary and proper, and that such assistants and clerks shall and may be appointed by such officers respectively, subject to the approbation of the Lord Chief Baron for the time being; and that each of the said officers shall at all times be responsible for the conduct of such of the said assistants and clerks whom he shall appoint.

That no person holding any of the said offices, or being an assistant or clerk to any of the said officers, shall act as an attorney or solicitor, or agent of an attorney or solicitor, in any Court of Law or Equity in the United Kingdom of Great Britain and Ireland, either separately or in partnership with any other, during such time as he shall hold such office or act as such assistant or clerk.

That the office of Clerk of the Errors, now filled and executed by the said Thomas Dax, shall continue to be filled and executed by him as long as he shall be a Master or Prothonotary of the said Court, and no longer; and the same shall always hereafter be filled by the person who shall be the senior Master or Prothonotary of the Court for the time being.

That the said officers and their assistants and clerks shall give their attendance in Court or elsewhere, and shall conduct the business in their several departments, at such hours, and in every respect in such manner as the said Lord Chief Baron and other Barons of the said Court shall from time to time order and direct.

That if either of the said officers shall, from sickness or other reasonable cause, have occasion to be absent from the business of his said office, then, and in every such case, it shall and may be lawful for such officer, by and with the permission of the Lord Chief Baron for the time being, or in his absence, of some other Baron of the said Court, to give leave of absence, by his order in writing to such officer, and if necessary, to appoint a deputy in his place and stead, during such time as shall be expressed in such order, and the name of such deputy, and also the cause and time of such absence shall be stated in such order; and such deputy may, if occasion shall require it, be changed by the said Lord Chief Baron, or in his absence, by some other Baron of the said Court; and every such deputy shall be paid by the principal for whom he shall so act as aforesaid, and as the said Lord Chief Baron or other Baron of the said Court shall direct in such order.

That if either of the said offices shall become vacant, or if any such officer shall be unable to act in his said office from sickness or any other cause, and shall be unable to appoint a deputy, then, and in every such case, it shall and may be lawful for the Lord Chief Baron, by warrant under his hand and seal, to appoint a person to perform the duty of such officer, until there shall be an effective officer to discharge the same; and such person so appointed, shall, during the continuance of such deputation or appointment, have all and every the rights, emoluments, powers and authorities, and shall be subject to the same liabilities, as such officer whose duty he shall so have been appointed to perform would have possessed or been liable to.

That when a vacancy shall occur in the said office of Clerk of the Pleas, by the demise of the said William Stewart Rose, Esquire, or otherwise, the said office shall not again be filled up, but the same shall from thenceforth cease and determine.

That if any vacancy shall occur in either of the said offices of Master and Prothonotary during the lifetime of the said William Stewart Rose, and while he shall hold the said office of Clerk of the Pleas as aforesaid, the said William Stewart Rose shall, as often as such vacancy shall happen, appoint a person to succeed to such office, subject to the approbation of the Lord Chief Baron for the time being; and after the death of the said William Stewart Rose, or other determination of his said office, when any vacancy shall occur in either of the said offices of Master and Prothonotary, the Lord Chief Baron of the said Court for the time being shall appoint a fit and proper person to fill the same; and when, at any time after the passing of this act, any vacancy shall occur in the offices of Clerk of the Rules and Filazer of the said Court, the Lord Chief Baron for the time being shall appoint a fit and proper person to fill such office.

That this act, and every clause and matter therein contained, shall commence and have effect immediately from and after the passing of the same.

That this act may be amended, altered, or repealed during the present session.

PRACTICAL POINTS OF GENERAL INTEREST.

No. XXVI.

COACH-OFFICE LIEN.

The following case, we believe, is new in its circumstances, and as such we present it to our readers.

The plaintiff went to the coach-office of the defendant in Liverpool, and asked the fare to London by the Express coach; and being told it was 30*s.*, he put down a 30*s.* Irish note on the counter, which the book-keeper declined taking; the plaintiff then took the note up, asking permission to leave his portmanteau, saying, that he would go by an earlier coach, if he could find one; which he did. It was further proved, that the defendant refused to deliver up the portmanteau, unless a sum of

30*s.* was paid. For the defendant witnesses were called, who stated that after taking up the 30*s.* note the defendant said, "Book me an outside place on the Express, and I will leave my portmanteau;" and that an outside place was accordingly booked.

Lord *Tenterden*, C. J. (in summing up).—If you believe that the plaintiff said that which has been stated by the defendant's witnesses, I think that it gives him a lien on the plaintiff's portmanteau for something, certainly not for 30*s.*, but for something; and as the plaintiff has not tendered any thing at all, that would entitle the defendant to a verdict.

Verdict for plaintiff.—*Higgins* v. *Bretherton*, 5 C. & P. 2.

LAW REPORTING.

Reports of Cases determined in the King's Bench Practice Court. By Alfred Septimus Dowling, Esq., of Gray's Inn, Barrister at Law, 1832. Sweet.

Notes of Points in Practice ruled in the Exchequer of Pleas, and the Cases at Law and in Revenue, argued and determined in the Court of Equity, and the Courts of Error and Appeal. By George Price, Esq. of the Middle Temple, Barrister at Law. Sweet, 1832.

We are happy to find, that a considerable improvement has taken place in the system of law reporting. We do not know what portion of it has arisen from our efforts on the subject; but we are naturally inclined to think, that our former articles have not been entirely without effect. Certainly we have little fault to find with many of the present reporters; and if they were public officers, appointed by the Court, and paid by the public, we should have still less. This plan is attended with so many obvious advantages, that we are surprised it has not been adopted. It was long ago recommended by Lord Bacon, and has been many years adopted in the United States of America. In some States, a short analysis is printed half yearly of all the judgments delivered in the Courts. This organized system brings the business of the Courts and the character of the Judges more usefully before the people and the legislature.

The character of these stipendiary reporters has always been high. The last who held the office in the Supreme Court at Washington, is the present minister of the United States in Denmark; and at the end of the eight volumes which have appeared of his Reports, he has placed an appendix of comparative views of the laws of different countries, on the various subjects discussed in the cases reported. This system has been found to be attended with results so beneficial, that we hope ere long to see it adopted in this country.

We have now to mention two new series of Reports which have lately been commenced. The first is by Mr. Dowling, of the cases decided in the Practice Court of King's Bench, accompanied by the decisions of the Courts of Common Pleas and Exchequer, given on practical points. The plan of the work appears to us very useful. It is of great importance to the practitioner to have all these cases brought together, more particularly as the practice of all the Common Law Courts is now to be assimilated, and the new Common Law Process Bill has passed. The reports are certainly executed with ability. They are short, and to the point; and, with scarcely an exception, all the cases are new and instructive. We think that the profession is under considerable obligation to Mr. Dowling for the care which he has evidently bestowed upon them, and they must meet attention and obtain authority.

Mr. Price's Reports consist as well of the cases in practice, as on law and in revenue, decided by the Court of Exchequer. His ability as a law reporter has long been known, and his reputation well established. It is not likely to be diminished by the present work. In his preface he recognizes all the rules which we have always laid down on this subject as his guide, as he professes to take the "simple and obvious process of discarding all the obtrusive wordiness of lengthy pleadings, of no worth as precedents; all unnecessary facts; every frivolous or useless argument; and even the more valuable reasoning, as no longer of importance where the judgments are conclusive, and extinguish the doubts on which the discussion proceeds; all inapplicable authorities and needless extracts from the common cases, although in point, from books in every lawyer's possession." Mr. Price has also given a somewhat discursive introduction to his Reports, in which he declares himself to be of opinion, that a new style of reporting is necessary, and insists on the necessity of a uniformity in the practice of all the Courts. In this we cordially concur; but we can hardly approve of the novelty of a reporter giving an opinion on the judges whose decisions he reports. Thus we admit, but do not see that it is neces-

sary to state, that Lord Lyndhurst "has fully justified the very sanguine expectations of the profession;" and that Mr. J. Bayley has "accumulated as large a fund of ready practical knowledge in the business and learning of the Common Pleas, according to the course of the King's Bench, as that of any single Judge who ever sat in Westminster Hall." With this exception we highly approve of these reports.

ON THE LAW RELATING TO LIFE INSURANCES.

We inserted in a recent number[a], a letter from a correspondent, on the question of the interest of the assured in life insurance policies, and our attention has since been called to the importance of the subject. Our correspondent supposes, that although from the liberality of the Equitable and other Insurance Offices, no objection would be taken on the ground of want of interest in the party to whom the policy was assigned; yet that if the objection were taken, a Court of law must allow it.

Without entering at present into a discussion of the several cases which have been decided on this point, we may observe, that it is competent for the assured to prevent all doubt on the subject by a special provision in the policy. Different offices vary in some respects in the clauses and conditions of these contracts, although their general nature is the same. In the Law-Life Society, in addition to the usual provisions in favor of the assured, the following condition has been adopted:

"Assurances made by persons on their own lives who shall die by duelling, or by their own hands, or by the hands of justice, will become void so far as respects such persons; but shall remain in force so far as any other person or persons shall then have acquired a *bonâ fide* interest therein, by assignment or by legal or equitable lien: and if any person assured upon his own life, and who shall have been so for at least five years, shall die by his own hands, and *not felo de se*, the directors shall be at liberty, if they shall think proper, to pay for the benefit of his family any sum, not exceeding what the society would have paid for the purchase of his interest in the policy, if it had been surrendered to the society the day previous to his decease; provided that the interest in such assurance shall be in the assured, or in any trustee or trustees for him or for his wife or children, at the time of his decease."

[a] P. 25, *ante*.

Here, it will be observed, whilst those whose crimes have been the immediate occasion of their death, are precluded from the benefit of the policy, the interests of others are considerately protected; and this extends not only to the assignees and mortgagees or other incumbrancers of the policy, but, in a limited degree, to the family of the deceased. This provision is both just and humane: the innocent are not made to suffer for the guilty; and the surviving family are not afflicted with the total loss of property by an act which is a sufficient calamity in itself.

Amongst the beneficial arrangements which have been made at the Law Life-Assurance Society, may be mentioned the *registration of assignments* of policies, and which include, we understand, all charges on such policies, whether by way of mortgage or lien. Thus a policy which has been kept up for any length of time, becomes a valuable and permanent property, capable of being continued by those to whom it has been assigned, and enabling the assured either to discharge his obligations, or make provision for his family. By these means also, creditors are secured the ultimate discharge of claims which probably by no other means could be satisfied.

We need not enlarge upon the advantages of Life Insurance Societies to all classes of the community, particularly to professional men, who very generally are prevented, at least for a considerable period of their lives, from making any material saving from their income, and who, by the nature of the investment in these societies, are removed from the constant temptation of breaking in upon the fund which they may have set apart for the future wants of themselves or families.

We shall take an early opportunity to consider the subject more at large: but in the mean time deem it proper to prevent any doubt on the point to which our correspondent had adverted.

It may be proper to correct a misapprehension, that the policies effected in the Law Life Society are limited to professional men. It is true that the Proprietory consists of the several branches of the profession; and the most eminent members of each—namely, an equal number of barristers and solicitors or proctors,—form the Board of Directors; but assurances are effected on the lives of *all classes* of persons, and the advantages conferred on the assured in regard to a division of the profits, are, we understand, superior to most of the offices in London.

ON THE STAMP DUTY ACTS.

No. VIII.

AGREEMENTS—LEASES.

In continuation of our commentaries upon the subject of Stamp Duties (vol. 3. p. 355) we are here induced to select "*Agreements*," including therein *Cognovits*, which have been construed to be agreements.

Perhaps of all the items charged with stamp duty, none has caused more question and difficulty than the duty on agreements; nor has any duty given rise to more endeavours to promote an increase of revenue, nor more completely manifested such attempts to have been founded in narrowness of mind.

Agreements interfere with every transaction of life, and affect equally the gentleman, the agriculturist, the mechanic, the tradesman, the labourer, the merchant, the divine, the lawgiver and the law expounder, the literate and the illiterate. If men, to guard against the misgivings of memory, and to prevent controversy, reduce the terms of their bargain into writing, is it not oppressive and unjust to charge it with a duty, especially as in the more common occurrences of life, it is an exaction from the purse of the needy, and oftentimes of the miserable and distressed.

It is a duty that engenders fraud; has enabled the dishonest to entrap the unwary; has opened a wide field for subtle interpretation; and although, as will be seen, it is dealt out by measure, it has been attended with no beneficial results. In legislating on this matter, it might be more appropriate, instead of the word "expedient," used in our modern stamp statutes, to adopt the ancient correct phrase, "for the carrying on of war," since, most truly, the system furnishes no other than means of quarrel; and the fine drawing in some relative conclusions, may not inaptly be termed *les ruses de guerre*.

The agreement contemplated by the stamp acts is not a formal deed; it is an instrument either for a temporary purpose, or one preparatory to the making a regular deed—a mere sketch, or outline, or memorandum made at the moment, of something to be afterwards recollected or digested, and reduced to form.

Before the passing of the act expressly imposing a duty on agreements, no duty was paid. This *a fortiori* proves, that an agreement was not formerly considered to be an "indenture, lease, or deed poll," or an "indenture, lease, bond, or other deed;" all of which had been charged with stamp duty for nearly a century previous to the impost on agreements. There are cases which shew this fact, *e. g. Prosser* v. *Phillips*, 1765; *coram Parratt*, B. Bull. Nisi Prius, 269; *Hearn* v. *James*, 2 Br. Ch. Rep. 309. S. P.; *Estwick* v. *Way*, 1 Term Rep. 735.

There exists a notion, and, strange to say, we find it countenanced in the stamp law of agreements, that however defective an instrument may be in its legal construction or import, the affixion of stamp duty removes all obstacles, and renders it effectual and valid, and gives it a character; but it is not so. If the instrument in itself be informal, or if it be insufficient for the purpose intended, the affixion of a stamp does not alter its character, denomination, or quality. The statutes declare, that each instrument, according to name, shall be charged with a certain stamp duty; and then follows, for the better securing the receipt and collection of the revenue, that no record, deed, instrument, or writing shall be pleaded or given in evidence in any Court, or admitted in any Court to be good, useful, or available, unless duly stamped: accompanied by a salvo for rectifying an improperly stamped instrument, on payment of a reasonable penalty.

The first imposition of stamp duty on agreements was ushered into practice in the year 1783, but different in language and amount to that now in force, *viz.* "*Any agreement*, whether the same shall be only the evidence of the contract, or obligatory upon the parties from its being a written instrument;" and in a subsequent clause—"where the matter shall exceed the sum of 20*l.*" duty 6*s.* In 1795 an additional 1*s.* duty was imposed; and in 1797 a further additional 3*s.* duty was imposed, (making 10*s.* duty); and by way of boon, a progressive duty of 10*s.*, according to the number of words, was likewise imposed on agreements. The desire to charge this progressive duty appears to have been so strong, that the 37 G. 3, c. 19. was amended by 37 G. 3, c. 90, in order to effect it. We need scarcely note, that a progressive duty still continues to be payable.

Notwithstanding the disposition shewn in these enactments to avoid interfering with general and accustomed practice and definition, the unlettered were unable to interpret the word "*any*" to mean, "only" an agreement *under hand*, and therefore used to seal as well as sign their agreements, thereby converting the instrument into a deed, instead of its being simply an agreement. This gave rise to the case of *Robinson* v. *Dryborough*, 6 Term Rep. 317, wherein it was held, that articles of agreement *under seal*, stamped with an agreement stamp, was inadmissible evidence. At that time the agreement and deed stamp were both of the same amount; but a distinction then prevailed [which does not now in this instance] as to fashion and character of the die, and upon such distinction that verdict was founded; yet the principle is preserved, that an agreement is not always a deed.

Of the foregoing circumstances advantage was taken, under colour of explaining and removing doubts and difficulties. Accordingly, in the year 1804, the words "*under hand only*," were introduced into the statutes of that year; and a further additional duty of 6*s.* was also imposed, both on the agreement substantially, and progressively on the number of words it contained.

In 1808 a new light appears to have broken forth, enabling the legal character of an instrument to be measured by the number of words it contained. It was presumed—justly

no doubt—in consequence of the stamp duty on leases much exceeding the duty charged upon agreements, that a method was practised of substituting an agreement in place of a lease[a], whereby the revenue might suffer; and therefore, to counteract such plan, a somewhat new mode of expression, and an entirely new scale of duty were contrived; which was also adopted in 1815, differing only by further increasing the duty, as appears by the following extract:

	Duty imposed in 1808.	Duty imposed in 1815, being the duty now payable.
Agreement or any *minute* or *memorandum* of an agreement made in *England*, under HAND ONLY, or made in *Scotland* without any clause of registration, (and not otherwise charged, nor expressly exempted from all stamp duty), *where the matter thereof shall be of the value of 20l. or upwards*, whether the same shall be only evidence of a contract, or obligatory upon the parties, from its being a written instrument, *together with every schedule, receipt, or other matter*, put or endorsed thereon, or annexed thereto.		
Where the same shall *not* contain *more than* 1080 *words* - - - - -	£. s. d. 0 16 0	£. s. d. 1 0 0
And where the same shall contain *more than* 1080 *words*. - - - - -	1 10 0	1 15 0
And for *every* entire quantity of 1080 *words* contained therein over and *above the first* 1080 words, a further progressive duty of - - - - - -	1 0 0	1 5 0

By this extract it will be perceived, that instead of adhering to the true legal distinction made between an agreement and a deed, the scale is contrived so as to charge an instrument, not being a deed, with the duties applicable to a deed; and, in order to shew more distinctly such an intention, it is expressly enacted, "that the provisions and regulations of former acts relating to agreements, shall be applied only to such agreements as are charged with 16*s.* [now 20*s.*] duty." And that agreements charged with the higher duties, shall be subject and liable to the same provisions and regulations as *deeds* charged with like duties." Thus advancing a doctrine that the quantum of words is to decide whether an agreement is a deed or not a deed, with no other view than, in many instances, to cause duty to be paid twice over on the same transaction, and also much perplexity.

As to agreements being substituted for leases, the supposition is absurd. Can a distress for rent be sustained under an agreement for a lease? And if not, will the stamping it as a lease or deed remove the difficulty? certainly not.

Our ancient legal writers say, *an agreement* being put in writing only for *remembrance*, doth not change its nature; but if it be put in writing, *sealed and delivered*, it is of greater force. Hob. 79. That any thing under *hand and seal*, which imports an agreement, will amount to a covenant. 1 Lev. 155. That to the validity of a *lease*, it *must be signed and sealed* by the parties, or at least by their agents properly authorized. 1 Anst. 229. Ow. 100.

In 1 T. R. 735, and 2 T. R. 739, it would appear that an agreement containing a clause for granting a formal lease; also words of present contract; of immediate possession, and portending to have been the intention of the parties that it should have the effect of a lease, should be deemed good as such. The then stamp statutes made no express distinction whether the instrument be under seal or not; and, perhaps, from these reports a conclusion may be drawn, that the above kind of agreement required a lease stamp, but that a mere agreement for a lease required only an agreement stamp.

In *Clayton* v. *Burtenshaw*, 7 D. & R. 800, and 5 B. & C. 41, S. C. it was held, that an agreement *under seal*, whereby *A.* agreed to take and hire of *B.* a house and premises at a certain rent; but which contained no words of demise, nor any thing to shew when the interest was to commence or determine—was no more than an agreement for a lease, *although stamped as a lease*[b] *with* 30*s. duty*, and being *sealed* required to be stamped as a deed; *i. e.*, with a 35*s.* stamp.

In *Rex* v. *Ridgwell*, 6 B. & C. 665, an instrument, in language purporting to be a conveyance of land, not being by deed, and *not under seal*, could not operate as such; but, in so far as it contained a stipulation not to disturb the grantee in the enjoyment of the premises, the instrument was held to operate as an *agreement*, and to require a stamp accordingly.

In *Cornish* v. *Searell*, 8 B. & C. 471, a sequestration having issued against the lessor, the lessee signed an instrument as follows: "I hereby attorn and become the tenant to *C.* and *D.*, two of the sequestrators, and I hold the same for such time and on such conditions as may be subsequently agreed upon:" it was held, that this was an agreement to become *tenant*, and required an agreement stamp accordingly.

In *Ramsbottom* v. *Tunbridge*, and *Ramsbottom* v *Mortley*, 2 M. & S. 434 and 445—as to letting lands by auction—if a written paper,

[a] 48 Geo. 3. c. 149, § 9.

[b] This stamp was affixed by the advice of the officers of the stamp office, 5 B. & C. 47.

signed by the auctioneer, containing a description of the lands, with the terms and rent, be delivered to the accepted bidder, such paper must be stamped as an agreement, although it be only evidence of part of the contract; but if *not signed* no duty becomes payable.

None of the aforegoing decisions appear to disturb the legal distinction between an agreement and a deed;—with regard to agreements, the shackles of the stamp law have certainly given rise to perplexity; but the result shews the folly of such enactments.

An agreement, in legal acceptation, is a memorandum or minute containing the consent of one or more persons to part with, and of another or others to receive, some right, property, or advantage; and by the statute of frauds, all agreements respecting land, except leases not exceeding three years, must be in writing duly executed. However favourably courts of justice may, in some instances, have construed this statute where its principle, the prevention of fraud, was not endangered, nor the spirit of the statute counteracted; it would be highly dangerous to sustain a revenue act at the risque of destroying so excellent a safeguard to property.

By *Powell* v. *Edmonds*, 12 East, 6, and *Copley* v. *Day*, 13 East, 241, if in one instrument *several distinct matters* are agreed upon between *different parties* NOT POSSESSING A COMMON INTEREST IN THE WHOLE subject matter of agreement, that instrument must be impressed with as many stamps as there are parties possessing such different interests; OR, if stamped with one stamp, will be evidence only for the one party to whose name the stamp may appear exclusively applicable. The case of *Boase* v. *Jackson*, 3 B. & B. 185, and 6 J. B. Moore, 480, was decided on the same principle: the *lease* in that case was from one party to one other party—it contained *two distinct demises* of different properties at *two distinct rents*; but being one letting and one entire bargain, was held to require but *one stamp*, according to the aggregate amount of the two rents reserved.

By *Baker* v. *Jardine*, 12 East, 325, and *Davis* v. *Williams*, 13 East, 232, if the agreement relate to *one entire subject only*, then one stamp is sufficient, whatever number of parties may have joined in the contract.

These latter cases, coupled with *Cook* v. *Jones*, 18 East, 237; *Bowen* v. *Ashley*, 1 N. R. 274; *Goodson* v. *Forbes*, 6 T. R. 171; and *Allen* v. *Morrison*, 8 B. & C. 965, I think puts at rest some doubts as to building contracts; for there it is one entire subject, and one community of interest—A. the landlord merely undertakes to grant such leases as B. the contractor shall require and direct.

We thus find, after all the vauntings of stamp law on this head, that the agreement duty cannot be legally applied to landed property, as respects leases, beyond the memorandum *under hand* only, made preparatory to a more formal contract, and that the enactment is injudicious and the desired exaction unjust.

J. A. H.

[*To be continued.*]

SELECTIONS FROM CORRESPONDENCE.

No. VII.

NEW LAW-OFFICES.

We hope to see some progress made during the present summer towards the erection of new law-offices. We have received some elaborate letters on the subject of the inconveniences arising from the scattered situations and want of accommodation at the various places where legal business is now transacted. The practitioners, instead of being able to perform their duties at one central office, have to traverse nearly all the Inns of Court and Chancery, and some of the adjacent streets; and from the want of room, and scanty accommodation, those who have not chambers in the neighbourhood are put to needless expense and inconvenience.

The design of appropriating the Rolls' Estate to Record Rooms and Courts of Equity and Bankruptcy, will be extended, we trust, to afford chambers for the Common Law Judges, and for a range of offices suited to the magnitude of the legal business of the Superior Courts.

We add some letters on other subjects, to which we request our readers' attention.

CHEAP EDITION OF THE STATUTES.

The attempt now for the first time made, to put the public in possession of authentic copies of the statutes of the realm in a cheap commodious form, has been hailed with great satisfaction; and we beg leave to suggest that it would be a great desideratum, were such of the statutes at large (from the earliest period to the commencement of this year) as are now unrepealed, to be published in the same form; and we conceive that the subscription to such a work would be more than sufficient to remunerate handsomely the persons engaged in the enterprize, as it is well known, that many persons, both professional and otherwise, are at present deterred from encumbering themselves with numerous volumes of statutes, the greater part of which are totally useless and burdensome, by the excessive labour required to wade through them.

H., K., and W.

ARTICLED CLERKS.

To the Editor of the Legal Observer.

SIR,

I know not how it is, but the observation is a very trite one, which you have frequently made, that the profession appear not to take

heed of the times, but to be completely passive under the law reforms now before the public. No one can deny, I apprehend, that the laws require amendment, and among other improvements "devoutly to be wished," is that of subjecting articled clerks, before their admission as attornies, to an examination by the proper authorities, before whom they are to be admitted. I do not mean, however, that this should be done for the mere purpose of throwing impediments in their way; but that they should be examined upon points likely to arise during their practice as attorneys; and not upon abstruse questions, which would puzzle an experienced barrister.

I also think it would be desirable (now there are so many opportunities) that every articled clerk, before he be admitted, should attend some one of the lecturers upon the law; and that the lecturer should give a certificate of the clerk's attendance upon him during the whole course. L.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

PRACTICE.

The Bankrupt is not to be heard in a suit instituted against his assignees, if he be not a party on the record, although he charges collusion between them and the plaintiff, and that he is interested in saving a surplus of his estate.

The main question in this cause involved the case of an expectant heir, disposing of his reversionary interest for an inadequate price, without fraud on the part of the purchaser. The Lord Chancellor, during the argument upon that question, decided that the purchaser, now a bankrupt, whose assignees alone were the defendants to the suit, could not be heard, he being not a party on the record. His Lordship said he had carefully read the papers sent to him in support of the bankrupt's claim to be heard, and was well acquainted with the case he stated.

Sir *John Leach*, when he was Vice-Chancellor, made an order, upon the collusion between the assignees and the plaintiff's solicitor, that he (the bankrupt) might be heard upon his giving security for the costs. The order was not in that respect complied with, and Sir *Antony Hart*, successor to Sir *John Leach*, upon a similar application to him, refused to make such an order, signifying that that which was made by his predecessor was wrong. Lord *Lyndhurst*, Chancellor, did afterwards hear at great length the claims of the bankrupt to be heard, and refused to grant him a hearing in the cause. The Court would now follow the like course. The bankrupt was not a party on the record: if his assignees were not acting right, the proper way would be for the bankrupt to petition to remove them and have others chosen in their place, or to petition in the regular way in the cause to be let in to defend or prosecute it. There did not appear to the Court to be any ground for the charge of collusion, and the cause was conducted with the greatest zeal and regard to the bankrupt's interests.—*Earl of Portmore* v. *Taylor*. By the Lord Chancellor, Lincoln's Inn, Dec. 19th, 1831.

PRACTICE.

A suit, in which an order of reference was made, abates in 1811, *and no proceedings are taken until the suit is revived in* 1831, *when the old order of reference is proceeded with in the Master's Office. A motion to stay these proceedings until the revived cause is heard, is refused with costs.*

Sir *Edward Sugden* moved for an order to restrain the Master from proceeding upon an order of reference made in a suit which abated twenty years ago, until that suit, now revived, was heard. There were several suits instituted by Mr. Price Clarke and the late Lord and Lady Ormonde, between the years 1807 and 1810, to restrain the defendant from cutting timber, or doing other waste, upon an estate in which he had a life interest. All these suits were either dismissed or abated in 1810 or 1811, and in one of them the order of reference upon which the plaintiff was now proceeding before the Master was made. But that suit having abated in the year 1810, no further proceedings were had on the order of reference for twenty years and more. The *Vice-Chancellor*, however, had lately granted an order to revive the suit, and the plaintiff proceeded immediately with the reference before the Master. He submitted that no proceeding ought to be had upon that order after such a lapse of time, until the revived cause was first heard.

Mr. *Pepys* opposed the motion. If the plaintiff were to be restrained from coming in with the order of reference until the revived suit were heard, that would be a perpetual injunction against him; for it was a common revivor for the purpose of keeping the suit up, and it may never come to a hearing. The practice of the Court was, that a suit may be revived within twenty years after abatement. This suit abated in 1811, and the bill of revivor was filed in 1831, within the twenty years. The defendant demurred to the bill, and his demurrer was overruled in May last by the *Vice-Chancellor*, who made the order of revivor in the month of June after. The suit being revived, all the orders made on it before abatement were revived also.

The *Lord Chancellor* said the order of revivor was, no doubt, well made, for he believed it was appealed from but without effect. It was but reasonable to stop all proceedings on the order of reference until the plea of limitation as to the bill of revivor was discussed and disposed of, but he did not see any reason for stopping that order now that suit was revived. As, however, this question turned chiefly upon a point of practice, he would consider it; but

with the understanding, that if he should not on or before Monday say any thing about it, this motion was to be considered as dismissed with costs.

His Lordship did not say any thing about the matter since.—*Clarke* v. *Kindersley*. By the Lord Chancellor, Lincoln's Inn, December 13th, 1831.

ROLLS COURT.

DEVISE-ESTATE.

If lands are devised to trustees, with a discretionary power as to children's maintenance, and a power to appoint a receiver, they will take the legal estate.

Thomas Bray, by his will, bequeathed a sum of stock to trustees, upon trust, to retain the interest and dividends thereof, and pay them to his wife, for her life, and after her decease upon trust for his children, in such shares as she should appoint, and in default of appointment, equally; and a provision was contained in the will, giving the trustees a power to apply the interest of the children's shares for their maintenance, as they should think proper. The testator then devised his real estate to the same trustees, upon the same trusts, intents, and purposes, and subject to the same powers, provisoes and declarations, as were therein before declared and expressed of the sum of stock. By a codicil the trustees had power to appoint a receiver. The question was, whether the trustees took the legal estate in the lands.

Mr. *Pemberton*, Mr. *Tinney*, Mr. *Jacob* and Mr. *James Stewart*, appeared for the different parties.

The *Master of the Rolls*.—There is clearly a discretion vested in the trustees by the testator. This is given them by the maintenance clause; and they have also a power, by the codicil, to appoint a receiver. I think they take the legal estate.—*Bray* v. *Tatnall*, M. R. April 27th, 1832.

BANKRUPTCY COURT OF REVIEW.

USURY.—DISCOUNT.—COMMISSION.—AFFIDAVITS.—EVIDENCE.

It is lawful to charge commission, in addition to lawful interest, on discounting a bill of exchange, for the trouble and expense in keeping money for the purpose of discounting, and in presenting the acceptances for payment and otherwise.

Trouble and expense are incidental to discounting bills, and a commission may be charged; and it seems to be immaterial whether the party discounting be a banker or not. The affidavit in chief of a bankrupt cannot be received to support a charge of usury against a creditor; but if he has made an affidavit for the creditor, then his affidavit on the other side is evidence in the nature of a cross-examination, unless the creditor be dead, in which case the Court will not allow his demand to be prejudiced on the imputation of usury, supported only by the testimony of the bankrupt.

This was the petition of Howel Gwyn, Esq., and it set forth that his late father, William Gwyn, had in his lifetime pecuniary dealings with the bankrupt, and was in the habit of discounting bills of exchange for him. That the bankrupt became thus indebted to William Gwyn, and to secure the repayment thereof the bankrupt deposited with him a promissory note for 1000*l*., payable to the bankrupt or his order, by Thomas Chinn, but which was not indorsed by the bankrupt, and also the lease for three lives of a freehold house in Glamorganshire. That in August 1831, Mr. Charles Roberts, the solicitor to the estate of William Gwyn, settled all accounts with the bankrupt, and thereupon the bankrupt gave him his bill for 370*l*. 16*s*., the balance then ascertained, drawn on Thomas Chinn at four months after date, and accepted by Chinn. The petition further stated the bankruptcies of Rice and of Chinn in November 1831, and that neither the promissory note for 1000*l*., nor the bill of exchange for 370*l*. 16*s*., had been paid. William Gwyn died in May 1830. The petition prayed that the estate and interest of the bankrupt in the lease might be sold under the direction of the Court, and that the assignees of Rice might be directed to prove the amount due on the promissory note, and interest, as a debt due against the estate of Chinn, and to receive the dividends in respect thereof; and that the proceeds of the sale of the leasehold premises, after payment of the costs and expenses and the dividend to be received from the estate of Chinn, after deducting the expenses attending the proof of the promissory note and receipt of the dividend, might be applied in payment of the costs of this application or incident thereto, and afterwards on payment of the bill of exchange for 370*l*. 16*s*.; and if anything then remained due thereon, that the petitioner might be at liberty to prove the residue under the commission against Rice, and receive a dividend *pro rata*, and, in the mean time, might be allowed to enter a claim under the commission against Rice.

This petition was supported by the affidavits of the petitioner, and Rice the bankrupt.

On the part of the respondents, the assignees of Rice, there was filed an affidavit by Rice the bankrupt, that William Gwyn was accustomed to charge, and did demand of deponent a sum of 10*s*. on every sum of 100*l*. so discounted, and so in proportion for any less sum than 100*l*., by way of commission or brokerage, for the discounting of such bills and notes, over and above the legal discount thereon. That he had charged, in a great many instances, and that he did upon the occasion of his discounting the bills of exchange or promissory notes out of and in respect of which the debt of 370*l*. 16*s*. arose, charge and demand of deponent 10*s*. per cent. commission, over and above the lawful interest or discount of 5*l*. per centum for the time such bills had to run, and that deponent paid him the same. That William Gwyn was not a bill-broker or com-

mission agent; but a person using and employing his own money; and that upon the occasion of his discounting for deponent the bills or notes in respect of which the said debt arose, he did, to the best of deponent's knowledge and belief, use and employ his own money, and not the money of any other person, as a broker or agent.

Mr. *Tamlyn*, for the petitioner. The affidavit of the bankrupt cannot be received in evidence to increase the fund of his estate. He is interested in that increase, as if the estate shall produce more than sufficient to pay the creditors, he will be entitled to the surplus, and his allowance as a bankrupt will also be increased by it. It is a clear principle of evidence, that no man shall be permitted to give evidence in a cause by which his interest will be promoted. This point was decided, in bankruptcy, in the case of *ex parte Burt*, 1 Madd. 46, where the *Vice-Chancellor* held that the bankrupt's evidence, he not having obtained his certificate and released his interest, would not avail either before the commissioners or a jury, for it would be to increase his estate, and would lead to great mischief; and his Honour observed further, that after the death of the creditor it would be very easy for a bankrupt to get rid of a debt, if it were allowed to be done merely upon his deposition that it was tainted with usury. And as there was no testimony, oral or written, to prove the usury, except the deposition of the bankrupt, who was not a competent witness, it would be a useless expense to direct an issue. Or the Court would not direct an inquiry where no prospect appeared of prosecuting it with effect. The creditor being dead, the Court could not confront the bankrupt, and the petition to expunge the debt was dismissed. But supposing it should be contended, that the affidavit of the bankrupt filed by the respondents could be given in evidence in the nature of cross-examination, in consequence of an affidavit of the bankrupt having been filed on the part of the petitioners, yet the Court would not receive it in evidence now that the creditor had been dead nearly two years, and that consequently the petitioner had not the means of confronting his testimony to that of the bankrupt, more especially as nearly twelve months after the death of Mr. William Gwyn the bankrupt had settled the account with the solicitor to that gentleman's estate, and the balance was ascertained; but no imputation of usury was then made, nor was any subsequently made until after this petition had been presented. With respect to the affidavit itself, what did it state? that Mr. Gwyn had charged one-half per cent. for commission; it did not state that that charge was a pretence for increasing the discount beyond the rate of lawful interest; and it had been decided, in the case of *Carstairs* v. *Stein*, 4 Maule & Selwyn, 192, that if the commission be fairly set to the account of trouble and inconvenience, it is not usurious. Applying that principle to the case before the Court, we find Mr. Gwyn discounting for the bankrupt, a draper in a town in Wales, bills of exchange accepted, in all probability, by little dealers, and captains and pursers of mines in a range of twenty miles. These acceptances he had, by his clerks, to present for payment, with this additional difficulty to encounter, that of another language, which rendered an interpreter necessary. It would perhaps be said, that in the case cited the parties were bankers: but there is no magic in that word. Any man who is intrusted with other people's money is a banker, and it is impossible for the bankrupt to know whose monies were employed in discounting his bills; yet even that is immaterial to the issue, which is, whether one-half per cent. was more than a compensation for the trouble and inconvenience. It clearly was not, and hence the imputation of usury falls to the ground.

Mr. *Swanston* and Mr. *Ching*, for the respondents. It is clearly established, that the Court will entertain a question of usury upon the affidavit of the bankrupt. Lord *Eldon*, in *Benfield* v. *Solomans*, 9 Ves. 84, said, "Suppose a mortgage of the bankrupt's estate to be usurious, the creditor coming to prove in the ordinary proceeding, any other creditor or the bankrupt might present a petition, and the Court upon his affidavit stating the usury, will put the creditor to answer, and if the affidavit were unanswered, the security will be cut down altogether." In the case before the Court an affidavit by the bankrupt has been filed on the part of the petitioner; and surely an affidavit made by the bankrupt on the part of the respondents, is receivable in the nature of a cross-examination. This affidavit proves distinctly that the creditor charged one-half per cent. in addition to lawful interest, and he had not the character of a banker, as in the case of *Carstairs* v. *Stein*, which had been cited on the other side. Bankers keep clerks, and have trouble and incur expense in providing money for the bills they discount. This entitles them to charge a commission; but the present creditor, not being a banker, could not make any such charge.

Per Curiam. The objection raised by the respondents against the debt claimed by the petitioner is, that it is tainted with usury; but the fact has not been satisfactorily made out, and therefore the prayer must be granted. An affidavit of the bankrupt having been filed in support of the petition, it is competent to the respondents to file an affidavit by the bankrupt in answer. Had Mr. Gwyn been alive, and had not denied the fact stated in the affidavit of the bankrupt, it would have been established; but in the case before the Court the creditor has been dead nearly two years, and the imputation of usury was neither made in his lifetime nor when the accounts were settled with the solicitor to Mr. Gwyn's estate, nor until the 18th of last month, when the bankrupt made his affidavit on the part of the respondents. A usurious intention is not established. To establish a case of usury, it must be shown that the statute has been violated—that something has been received in addition to lawful interest, and in substance, under

whatever disguise, as interest; but the bankrupt, in his affidavit in this case, does not say that the one-half per cent. was paid colourably, but that it was paid for commission; and the taking of commission *bonâ fide* is not usury. Trouble and expense are incidental to discounting bills; the party discounting has the trouble and expense of keeping money in his hands or at his banker's, for the purpose, and of presenting the bills for payment when due. And it was decided in *Carstairs* v. *Stein*, that it was lawful to take a commission. The prayer of the petition must be granted.—*Anon.* May 5th, 1832. B. C. R.

SITTINGS OF THE MASTER OF THE ROLLS,

In and after Trinity Term, 1832,

At ten o'clock in the morning.

At Westminster.

Saturday (at half-past one)	May 26	Petitions and Causes, Further Directions, and Petitions by consent.
Monday -	28	No Sittings — King's Birth Day.
Tuesday -	29	No Sittings — King Charles's Restoration.
Wednesday -	30	Causes, Further Directions, and Exceptions in General Paper.
Thursday -	31	No Sittings. — Holy Thursday.
Friday -	June 1	Causes, Further Directions, and Petitions by consent; and Causes, Further Directions, and Exceptions in General Paper.
Saturday -	2	
Monday -	4	Causes, Further Directions, and Exceptions in General Paper.
Tuesday -	5	
Wednesday -	6	
Thursday -	7	
Friday -	8	Causes, Further Directions, and Petitions by consent; and Causes, Further Directions, and Exceptions in General Paper.
Saturday -	9	
Monday -	11	Causes, Further Directions, and Exceptions in General Paper.
Tuesday -	12	
Wednesday -	13	
Thursday -	14	
Friday -	15	Causes, Further Directions, and Petitions by consent; and Causes, Further Directions, and Exceptions in General Paper.
Saturday -	16	Causes, Further Directions, and Exceptions in General Paper.

At the Rolls.

Monday -	18	At ten o'clock, to swear in Solicitors, and on General Petitions.
Tuesday -	19	Short Causes.
Wednesday - and on the subsequent days till the last Seal.	20	Causes, Further Directions, and Exceptions in General Paper.

On the day after the last Seal on Petitions.

One day in each week during the Seals will be appointed for hearing Causes, Further Directions, and Petitions by consent

The Sittings at Westminster will be in the Committee Room, as before.

COMMON LAW SITTINGS.

KING'S BENCH.

Trinity Term, 1832.

IN TERM.

MIDDLESEX.		LONDON.	
Monday	May 28		
Friday	June 1		
Thursday -	14	Friday -	June 15

AFTER TERM.

Monday -	June 18	Tuesday -	June 19

The Court will sit at eleven o'clock on the 28th of May, 1st and 14th of June, at twelve on the 15th of June, and at half-past nine on the other days.

Causes in the list on the 28th of May and 1st of June, not disposed of on those days, will be tried by adjournment on Tuesday the 29th, Wednesday the 30th of May, Saturday the 2d of June, and Monday the 4th of June. Undefended Causes only will be tried in London during the Term, *viz.* on Friday the 15th of June.

COMMON PLEAS.

Trinity Term, 1832.

IN TERM.

MIDDLESEX.		LONDON.	
Wednesday -	May 30	Thursday -	May 31
Wednesday -	June 6	Thursday -	June 7
Wednesday -	13	Thursday -	14

AFTER TERM.

Monday -	June 18	Tuesday -	June 19

The Court will sit at eleven o'clock in the forenoon on each of the days in term; and at half-past nine precisely on each of the days after term.

EXCHEQUER.

IN TERM.

MIDDLESEX.		LONDON.	
Wednesday	May 30	Friday -	June 1
Tuesday -	June 5	Friday -	June 8

AFTER TERM.

Monday -	18		
Wednesday -	20	Tuesday -	19

The Court will sit at ten o'clock each day.

NOTES OF THE WEEK.

House of Lords.

CONTEMPTS IN ECCLESIASTICAL COURTS—LUNATICS — PRESCRIPTION — PRESCRIPTION (TITHES).

These bills still wait for the second reading.

SENTENCE OF DEATH.

This bill waits for the Committee.

CONTEMPTS IN EQUITY.

This Bill waits for the third reading.

House of Commons.

WITNESSES IN EQUITY.

The second reading deferred.

PRIVILEGES OF PARLIAMENT.

A bill has been read a first time "for preserving the dignity and independence of the House of Commons, by causing the Seats of Insolvent Members to be vacated, by preventing the Election of Insolvent Persons to serve as Members, and by removing difficulties touching the rights of Creditors against Bankrupt Members."

REMOVAL OF ASSIZES.

The Norfolk Assizes Bill has passed the second reading.

A notice of a motion for a Bill to remove the Summer Suffolk Assizes from Bury to Ipswich has been given by Mr. Wason for the 26th June.

PUNISHMENT OF DEATH.

The Committee on this Bill has been deferred till the 30th instant.

BIRTH'S REGISTRATION.

Considered in Committee, and reported, and the further consideration deferred till Monday.

ARBITRATION.

The Committee on this Bill has been further deferred.

LUNATICS' COMMISSIONS—EXCHEQUER COURT OFFICERS.

These Bills have been read a second time, and committed.

CRIMINAL LAW.

Mr. Godson has given notice in Committee on the Punishment of Death Abolition Bill:—

1st, That in all cases of cutting and stabbing, if the Judge shall be of opinion that the offence (if death had ensued) would have been manslaughter only, then the Judge shall have power to inflict some punishment;—

2d, That in all cases of charges for embezzlement, the prosecutor shall, before the Assizes, give a note to the prisoner, of the dates and sums of money included in each indictment;—

3d, That magistrates shall not have any power, in a summary way, over assaults, when it is alleged that the assaults have been committed with certain intents;—

4th, That a bill of exceptions, in matters of law and evidence, may be tendered to the Judge in criminal cases, who shall be bound to receive the same, to be heard afterwards by the Judges in open Court.

CORONERS' BILL.

The report to be considered on the first of June.

BANKRUPT ACT AMENDMENT.

Instruction to Committee: to provide more effectually for entering of record proceedings in Bankruptcy; for the proof thereof; for the safe custody of all matters in Bankruptcy; and for giving effect to the adjudication of Bankruptcy.

UNIFORMITY OF PROCESS—EQUITY PROCESS.

These bills have received the Royal Assent.

ANSWERS TO QUERIES.

COMMON LAW.

BILL OF EXCHANGE. VOL. III. P. 363.

If your correspondent had referred to the 6 Geo. 4. c. 17, he would have found that by the 125th section of that act, any *contract* or security made with, or given to a creditor, in consideration of signing a bankrupt's certificate, is absolutely void. The bankrupt's acceptance of the draft is *a contract*, and cannot therefore be recovered on in a court of law.

J. J——s.

BANKRUPTCY.—COGNOVIT. P. 16, *antè*.

1. I am of opinion, that a judgment entered up under a warrant of attorney given after a writ has issued, is within the protection of the statute 1 W. 4. c. 7. § 7: but it is not so, if the warrant of attorney is given before any writ has issued, or whilst no "action commenced adversely" is pleading. W. T.

2. The 7th section of the 1 W. 4. c. 7. evidently includes judgments upon warrants of attorney: provided the action is commenced adversely, and a fraudulent preference is not intended, the *onus probandi* of it would lie with the party attempting to set aside such judgment. The clause expressly states, judgment on a *cognovit*, or by default, *confession*, or *nil dicit*; which second confession must be by warrant, or not at all: besides, a warrant of attorney is frequently given, to save expenses in actions *in case*; and the act is stated to have been passed to remedy cases where plaintiffs have been deterred from accepting a confession by reason of another statute then in operation. R. M.

EXECUTION.—COSTS. P. 16, *antè*.

1. Before the statute 43 G. 3. c. 46. § 5, a plaintiff was not entitled under a *fi. fa.* either to the sheriff's poundage, or the costs of the levy. *Lee* v. *Lingard*, 3 East's R. 400. Nor, in the present day, is he entitled to those charges under a *ca. sa.*, because they are given only by that statute, and the statute does not apply to executions against the person of the debtor. W. T.

2. As Boote is considered tolerable authority in all cases of common law, I beg to refer your "Enquirer" to the new edition of his "Suit at Law," edited by Crompton and Serj. Sellon, in 1823, p. 239, in which it is stated, that in his (Boote's) time, plaintiffs were obliged, in *all cases*, to pay the costs of execution, &c. Since then the *only* alteration made in the law upon the subject, has been by the 43 Geo. 3. c. 46; consequently, as regards executions by *ca. sa.*, it appears to me, that plaintiffs cannot add the costs thereof to the taxed costs, which, in practice, never include the execution: and this seems rather an anomaly, and a fit subject for the attention of the Common Law Commissioners. R. M.

NEW RULES.—INDORSEMENT OF COSTS. P. 16, *antè*.

The new order, referred to by O., is decidedly objectionable, in more respects than one; and it has surprised me, in common with many other members of the profession, that the judges have not amended it. It is very unjust towards attornies, that defendants should be allowed to pay the debt *and costs* to the plaintiff, which was not the case before, and it may be the cause of great loss to the profession. With regard to actions upon bills of exchange, only one party can now be sued, unless at the risk of losing the costs against the rest, as the words of the above order are too clear to admit of evasion. R. M.

PROMISSORY NOTE. VOL. III. P. 347.

The rule appears to be, that a bill is void when the time of payment is dependent on a contingency. 7 Term Rep. 242. But in the present case, the *time* of payment is certain, and can be enforced immediately after the death of *E. F.* The circumstance of *E. F.* having lived more than six years after the date of the note, cannot alter the case, as the statute of limitations does not begin to run until the time of payment arrives. J. J—s.

BILL OF EXCHANGE.—GOOD FRIDAY. P. 32.

1. The holder of this bill, by neglecting to present it on the day of payment, has exonerated the drawer and indorsers. *Vide Wiffin* v. *Roberts*, p. 247 of Bayley's Treat. on Bills, 5th ed. X.

2. Your correspondent P. T. W., I presume, is aware that three days' grace are, in this country, allowed to the drawee of a bill of exchange. Therefore, if the third day of grace happen to be on a Sunday, Christmas-day, or Good-Friday, the holder ought to present it for payment on the second day of grace, and in case it be not then paid must treat it as dishonored. 39 & 40 G. 3. c. 42. *Tassal* v. *Lewis*, Ld. Raym. 743. *Haynes* v. *Busis*, 3 Bos. & Pul. 599. Kyd, 9. Bayl. 109, 110. Mar. 95 & 96. I consider the drawer and indorsers are not discharged. See more on bills of exchange, in Chitty's Prac. Treat. on Bills of Exchange and Promissory Notes.

H. B. B.

LAW OF ATTORNEYS.

RE-ADMISSION. VOL. III. P. 348.

I do not apprehend that it was necessary for J. M. to take out a certificate during the time he was not in practice. The statutes imposing the certificate duties, appear clearly to apply only to practising attornies; and from the very words of the 37 G. 3. c. 90. § 31, it would seem, that non-practising attorneys are not disqualified in consequence of not having taken out their certificates. The 31st sect. of the act extends to those who *neglect* to obtain their certificates. In the cases *ex parte Matson*, 2 Dow. & Ry. 238; and *ex parte Cun-*

ningham, 1 Bing. 94, it was decided, that the word *neglect* implied culpability; and that non-practising attorneys, not coming within the meaning of the section, were therefore not liable to the penalty. Now it must be remembered, that the disqualification and the penalty form one entire section of the act. It must therefore follow, that if the section applies at all, it must apply altogether,—that if a non-practising attorney ought not to be fined, there exists no necessity for his re-admission. The above cited cases were applications for re-admission; and in ordering re-admission, the Court merely granted what the parties required. Whether J. M. can recover his professional bills or not, depends entirely on the necessity of his re-admission. J. J—s.

LAW OF LANDLORD AND TENANT.

PAYMENT OF RENT. VOL. III. P. 348.

I perfectly agree with you, that some of the answers of your correspondents should be supported by authorities; but when the question proposed is not at all difficult, I apprehend that it would be quite superfluous to cite cases in support of the answer, and I submit the present query to be of that description:—As *C.* took the rooms of *B.* he, of course, became *B.'s* tenant; and the mere circumstance of *C.'s* paying his weekly rent to *A.* and *B.'s* request, cannot alter the tenancy. *B.* was tenant to *A.* for the whole house, and *A.* has an undoubted right to distrain on any goods *on the premises*, for whatever amount of rent there may be due to him from *B.* It is quite impossible that *C.* can have any remedy against *A.* for distraining, as he had a legal right to do so. By *A.'s* receiving (at *B.'s* request) *C.'s* weekly rent, *A.* became *B.'s* agent, and therefore *C.'s* remedy is an action of *assumpsit* against *B.* for money paid to *C.'s* use, provided *C.* pays *B.'s* rent without allowing his goods to be sold; and a special action on the case if *C.'s* goods are sold. J. J——s.

QUERIES.

LAW OF PROPERTY AND CONVEYANCING.

TITLE DEEDS.—COVENANT.

A lease for a year is made, by virtue of the statute of uses, wherein is contained a covenant for the production of title deeds from the bargainer to the bargainee; and also an outstanding term is assigned to a trustee for the bargainee, in the same lease. Can the covenant be enforced after the expiration of the term? And is the assignment valid, and capable of taking effect at any distance of time? J. J.

DOWER.

A settlement was made, on the marriage of *A.* with *B.*, of certain freehold estates, to certain uses, upon which was charged an annuity payable to the wife after the decease of her intended husband, in lieu and bar of all dower and thirds at common law, with a power for the husband and wife jointly to revoke those uses, and to limit and appoint other uses. The marriage was solemnized, and the husband and wife subsequently jointly revoked all the uses of the settlement, and limited the same estates to the husband, to the usual uses, to bar dower, with an ultimate remainder to the husband in fee. The husband was and is possessed of other freehold estates, out of which, but for the settlement, the wife would have been entitled to dower at common law. The provision made for the wife by the settlement having been destroyed by the revocation of the uses thereof, is she entitled to her dower out of the other freehold estates of her husband, not included in the settlement? Or, as the provision in the settlement was in lieu of all dower, and the revocation thereof was her own act, does it still bar her right of dower in such other estates? J. J.

ANNUITY.—INROLMENT.

A., *B.*, and *C.*, maiden sisters, are seised in fee of a messuage, &c. For the sake of increasing their income, they have agreed with *D.* to convey to him the premises, in reversion, after the decease of the last survivor of them the said *A.*, *B.*, and *C.*, in consideration of an annuity of 50*l.* per annum, for the lives of the said *A.*, *B*, and *C.*, and the survivors and survivor of them. The annuity is to be secured by the covenant of *D.*, to be contained in the deed of conveyance, and by a proviso that in failure of payment for a stipulated period, the deed shall be void, and all previous payments forfeited. 1. Will the deed require to be registered under the annuity act? 2. Will a lease for a year be requisite to complete the conveyance? J. P.

REGISTRY ACT.

Is a *lease* for 71 years, an assignment of which has been made *by way of mortgage*, within the operation of this act? The *assignment* has been registered, and therefore the dictum of the act has so far been complied with (see Sugden's Vendors and Purchasers), and it *recites* the lease in question. ASPIRO.

LAW OF LANDLORD AND TENANT.

FIXTURES.

A., lessee for years, covenants with *B.*, that he will, at the expiration of the term demised, deliver up "all erections, buildings, fixtures, fastenings, improvements and additions, which shall at any time, during the continuance of the said term, be made or set up in or about the premises." *A.* has since erected a steam-engine on the premises, for the purpose of trade. May this be considered as a fixture or improvement? and can *A.* be restrained from removing the same at any time *before*, or at the expiration of the term? P. W. R.

ASSIGNEES.—NOTICE.

A. B. lets offices to *C. D.* for one year. The rent to be paid quarterly. *C. D.* entered into possession at Michaelmas, 1831, and paid the first quarter's rent at Christmas. In April, 1832, *C. D.* absconds, appointing three persons his assignees, one of whom paid *A. B.* the quarter's rent then due up to Lady-day, *continuing possession* in the name of *C. D.*, on the authority of his assignment. Can *A. B.* insist upon the assignees giving him the usual notice to quit? Or can *A. B.* recover his rent from the assignees up to the end of one full year, *viz.* Michaelmas, 1832, in the event of their removing the goods, &c. of *C. D.* from the premises, and leaving the same unoccupied?

A. B.

COMMON LAW.

ELECTION OF CHURCHWARDENS.

May I beg to be informed, through the medium of your useful publication, whether the proper time for appointing churchwardens is in Easter week, or on the 25th of March, or within 14 days after?

By the 90th canon of the church, churchwardens are to be appointed *in Easter week.* By 43 Eliz. c. 2. § 1. entitled, "an act for the relief of the poor," it is enacted, that the *churchwardens* of every parish, and four, three, or two substantial householders, to be nominated yearly in Easter week, or within one month after Easter, under the hand and seal of two justices, &c. *shall be called overseers* of the poor of the same parish. By 54 G. 3. c. 91, reciting that part of the stat. of Eliz. before set forth, "and that great inconvenience is often found to arise from the time for appointing such overseers being regulated by a moveable feast;" it is enacted, that after the passing of this act, the appointment of overseers of the poor, *so directed* by the said act of Queen Eliz., shall, in every year, be made on the 25th of March, or within fourteen days after.

A SUBSCRIBER.

LAW OF ATTORNEYS.

ATTORNEY.—LOST BILL.

A client being indebted to his attorney, gave him his own promissory note for payment thereof, which, when due, was dishonored. He afterwards calls on the attorney, and offers to indorse him a bill, which he had by him, in satisfaction of the amount, and (as he alleges) left the bill with the attorney, so indorsed, that he might consider whether he would keep or return it. The parties differ as to which of them has the bill, which no doubt has been lost or mislaid, the client protesting he left it with the attorney, and the attorney denying it. The bill, which was drawn on a person in the country, was made payable at the drawer's in London; but has never been paid, or presented. The indorsers, including the client, who is the last of them, are of course discharged, and the acceptor remains liable, but may not pay, if he can avoid it. The attorney believes the bill was never *left* with him; but his client, who is a respectable man, protests so strongly it was, that (notwithstanding the want of proof of the fact, if it be so, as both parties were alone when the transaction took place), he is inclined to believe his client, in preference to his own memory, and account for the amount as if he had received it. If he does, has he any remedy against the acceptor, for recovery of the amount? and is it necessary he should, before proceeding, tender him a bond of indemnity? or how, otherwise?

O.

MISCELLANEA.

SITE OF THE LAW INSTITUTION.—CARDINAL WOLSEY'S HOUSE.

It is somewhat curious, that on the site of the hall and library of this Society stood the residence of Cardinal Wolsey, when he was Chancellor of England; and on or near the spot where the club-room has been built, was the ancient Office of the Six Clerks of the Court. Subsequently the buildings were used as the Crown and Rolls Tavern; and at a still later date, one of the modern houses, which was removed to make room for the present edifice, had been occupied for many years by Sir John Silvester, the late Recorder of London. Built into the wall of one of the apartments were the arms of the Cardinal, cut in stone and emblazoned; this piece of antiquity was reserved, at the sale of the old materials of the building.

ANCIENT BILL OF COSTS.

The following is a copy of a bill of costs for passing a fine at bar, of which we have seen the original. It is remarkable that the whole profit of the bill to the attorney, is no more than 13*s.* 4*d.*, and consists of the two first items, and the last; and the profits are nearly in the same proportion to the expenditure, as at the present day. This bill was delivered to the parties, consequently it is not written in Latin, or with contractions, as it would have been against the statute then recently made, regarding the entering proceedings, &c.

"*Easter* Term, 1655.

"*A. D.* v. *Greenhill et Ux.*	For drawing *precipe* and concord	0	03	04
	Drawing fine at barre	0	03	04
The box		0	00	06
Ffees in Court		0	01	04
Writte of covenant		0	02	06
Retorne thereof		0	02	06
Lord Protector's ffine		0	16	08
Receiver's ffee		0	00	06
Affidavit, endorsing and entering		0	01	04
Warrant of Attorney		0	00	04
Keepers of the writts ffee		0	03	08
Entry of the Lord Protector's silver		00	0	10
Chirographer's ffee		00	05	08
Chirograph of ffine		00	04	00
Attorneys ffee		00	06	08
		02	13	02

The Legal Observer.

VOL. IV. SATURDAY, JUNE 2, 1832. No. LXXXV.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

CHANCERY REFORM,

AND

MR. SPENCE'S PROPOSED BILLS.

IT is now full time that something should be done—at any rate, that something should be said—with respect to the Reform of the Court of Chancery. Unless we are to believe that the reiterated declarations of public men are utterly valueless; unless what is spoken on one side of the Houses of Parliament, is to have no binding effect when the speakers sit on the other; unless statesmen are to drink the waters of forgetfulness the moment they accept office; unless orators are merely to advocate measures when they cannot carry them into effect; it seems clear, that a speedy and complete remedy for the abuses of this Court must be introduced; for if any man had been asked, for these ten years past, by whom a measure so desirable should be effected, he would have answered unhesitatingly, the present Lord Chancellor and Attorney-General, and the late Attorney-General of the Queen.

At present, all that has been done, or heard of, this sessions in Parliament, is a short notice of an intention to do something, by the Lord Chancellor, in the House of Lords, which has never been followed up. Out of the House, the profession has been favoured with two proposed bills of Mr. Spence, who is entitled to no slight praise, for his long, earnest, and disinterested labours in the cause of Chancery Reform. The substance of one of these we gave in a recent number[a]. The second is much less extensive, its intended object being simply to diminish the expense and delay of suits in the High Court of Chancery, for the administration of the personal estate and effects of persons deceased. The great alteration which is proposed to be introduced by it for these purposes, is to substitute, in all usual cases, a simple "*citation*" of the parties concerned, instead of putting them to the expense and delay of filing a bill, according to the present course. Thus when any person claims to be a creditor or legatee under the will of any deceased person, or claims to be entitled to his personal estate and effects, he shall cause a statement in writing, containing the ground of his claim, and naming such executor or administrator as defendant, and concluding with a prayer adapted to the case of the party making the claim, which statement shall be called "a citation," to be filed in the Record Office; and thereupon a *subpœna* shall issue under the common seal of the Court, to compel the person named in such citation to appear thereto at a certain time to be specified in such *subpœna*, being not less than eight days from the time of the service thereof, and shew cause, if he can, why an order of the Court ought not to be made, according to the prayer of such citation. To this citation, the defendant may shew cause by answer; and if no cause is shewn, either the plaintiff or defendant may set down the citation for hearing, and thereupon the usual reference may be made to a Master, to take an account of the personal estate. When cause is shewn by the answer, why the prayer of the citation shall not be granted, the plaintiff may set down the cause for hearing, and the Court may direct an issue to a court of law,

[a] *Ante*, p. 7.

or an inquiry before a Master, or such other proceedings as shall be deemed necessary, in order to ascertain the truth of the matter which is put in issue by the answer; and after the issue shall have been tried, or the inquiry made, the suit shall be again set down and proceeded in.

It is also provided, that an executor or administrator may stop the suit of the creditor or legatee, by payment or tender, after the citation is filed, and that an injunction may be obtained in such suits against creditors proceeding at law.

Under the proposed bill, an executor or administrator may institute a suit by citation, for the administration of the personal estate and effects of the deceased, and may call on any person who is a legatee, or entitled to a share of the personal estate of such deceased person, to shew cause, if he can, why the personal estate and effects of such deceased person should not be administered.

These are the chief provisions of the proposed bill; but we have not noticed many minor clauses, which evidently shew that its author has given it deliberate reflection. Forms of citations, &c. are appended, which are intended to be added as a schedule to orders to be made by the Lord Chancellor.

We trust that Mr. Spence will soon bring this, and his other bill, before the House of Commons, and let us see the present feeling of Parliament on the subject. If we are not mistaken, it is perfectly prepared to pass all reasonable measures for law-reform. Our contributor, "A Barrister," in his Eighth Letter to the Lord Chancellor[b], called the public attention to the subject; and we shall conclude our observations, by giving a part of a letter from another correspondent, who takes the same views.

"On looking back at what a reforming ministry had during eighteen months *done*,—at what efforts the great Law Reformer had himself made, either in his own Court, or in giving effect to what the different commissioners had done,—it was melancholy to see that the opportunity which might never return, was lost; and it was easy to see that his conduct would be a precedent for another ministry to follow, while their opponents would be estopped from any complaint. The sum and substance of Lord Brougham's labors appeared to be the "Bankruptcy Court Act;" which would most likely have been abolished by acclamation under his successor;—and as to his own Court, with all its abuses, (which he, while in opposition, had denounced so loudly,) they remained *just as they were*.

"It is true that bills for the reform of the Court had been talked of—some of them introduced into Parliament, and others privately circulated; but the public have learned under former chancellorships, that all this often means nothing; and as Lord Brougham, in his farewell address, said nothing whatever on the subject, the presumption is, that he really had sanctioned no project, and had none in his contemplation.

"But, luckily for his reputation, he has the rare advantage of obtaining a new lease of political power,—new opportunities of establishing his character on the firm basis of practical benefit to the legal institutions: and what now should be our anticipations? Shall they be of the same gloomy character? Shall we despair of any practical objects being pursued? Shall we expect that the Court, and its abuses, will remain untouched?—that his Lordship will allow a near relative even to profit by their continuance?—that all common law reform will be left to Lord Tenterden's discretion?—that the Commissioners' Reports will rest on the shelves, for any thing the law officers of the Crown will be directed to do with them?—and that we may see nothing attempted but showy questionable projections, which will produce no other effect but that of sometime or another loading the country with pensions on their abolition?

"Or shall we, on the other hand, hope that the warning may be taken? that the practical reforms suggested by the commissioners may be at length fairly acted upon;—that *reform* may not be another word for *job*;—that before this session expires, *a bill may be passed* for ending the open, tangible, acknowledged nuisances of the Court of Chancery, about which no one doubts, and which any honest practical adviser could point out the ready means of redressing?"

C. Z. B.

[b] *Ante*, p. 17.

NEW BILLS IN PARLIAMENT.

A BILL FOR PRESERVING THE DIGNITY AND INDEPENDENCE OF THE HOUSE OF COMMONS, BY CAUSING THE SEATS OF INSOLVENT MEMBERS TO BE VACATED, BY PREVENTING THE ELECTION OF INSOLVENT PERSONS TO SERVE AS MEMBERS, AND BY REMOVING DIFFICULTIES TOUCHING THE RIGHTS OF CREDITORS AGAINST BANKRUPT MEMBERS.

Whereas it is highly necessary for the preservation of the dignity and independence of Parliament, that Members of the House of Commons, who are not able to satisfy their creditors, and who are protected from personal arrest solely by reason of their privilege as members, should not retain their seats; that persons avowedly insolvent, should not be elected to serve as members; and that bank-

rupt members should not be allowed any privilege, as members, against the rights of their creditors; Be it therefore enacted, by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the *passing of this act*, process against the person may be issued, where the same shall be issued upon the authority of any judgment, recognizance, decree, order, rule or other final proceeding to compel the payment of money, although the person against whom the same is to be issued is or shall be a Member of the House of Commons; but that no such process shall be executed so long as the said person shall continue to be a member.

That before any such process shall be issued against any such member, a written demand shall be personally served upon him, signed by the party by or on whose behalf it is intended to issue such process, or by the attorney or solicitor of such party, demanding payment of the sum of money for the nonpayment of which it is intended to issue the same; and an affidavit of such service shall be made before the proper officer of the Court out of which it is intended to issue the same, and filed in that Court; and a duplicate of such affidavit shall be deposited with the Clerk of the House of Commons, who shall mark thereon the day of depositing the same, and shall cause notice thereof to be given to the member.

That from and after days from the day of depositing the affidavit last mentioned, such process may be issued; but that the same, instead of being delivered to the Sheriff or other officer who would have to execute the same if the person were not a member, shall be delivered to the Clerk of the House of Commons, who shall mark thereon the day of the delivery of the same.

That in case, after the expiration of days from the delivery of the said process, the sum for the nonpayment of which the same shall have issued, shall continue unpaid and unsatisfied, and the said process shall continue in force, so that the same could be lawfully executed if the person were not a member, the seat of the said member shall be thereby vacated; and it shall be lawful for the Speaker of the House of Commons for the time being, during any recess of the said House, whether by prorogation or adjournment, and he is hereby required, forthwith after the expiration of the last mentioned period, to issue his warrant to the Clerk of the Crown, to make out a new writ for electing another member in the room of such member.

That such member, whose seat shall so become vacated, shall not be eligible to be returned as a member upon the new writ to be made out by reason thereof, in case any process which by this act is authorized to be issued shall be in force at the time of the election.

That no person who at the time of the election shall be in custody under any such process lawfully issued and executed, shall be eligible to be returned to serve as a Member of the House of Commons.

That no person who shall have been discharged out of custody under the authority of any act for the relief of insolvent debtors, shall be eligible at any election to be returned to serve as a Member of the House of Commons, unless before such election he shall have paid or satisfied all the creditors in respect of whose debts he shall have been discharged.

And whereas by an act passed in the fifty-second year of the reign of his Majesty George the Third, intituled, "An Act to suspend and finally vacate the Seats of Members of the House of Commons of the United Kingdom, who shall become Bankrupts, and who shall not pay their Debts in full within a limited time," the seat of a member is, in certain cases therein mentioned, declared to become vacated; and it is expedient to alter some of the provisions of the said act; Be it therefore further enacted, That in case any commission or *fiat* of bankruptcy shall hereafter issue against any Member of the House of Commons, under which he shall be adjudged a bankrupt, and the same shall not, within days after the adjudication, have been superseded, his seat shall become vacated after the expiration of the said period, unless he shall have paid or satisfied or secured the payment of his debts, according to the provisions of the said recited act.

That no person against whom any commission or *fiat* of bankruptcy shall hereafter issue, and under which he shall be adjudged a bankrupt, shall have any privilege as a Member of the House of Commons, touching any proceeding which might be taken against him under the authority of such commission or *fiat*, in case he had not been a member.

LAW REFORM IN AMERICA.

We have from time to time taken occasion to state the progress of law reform in America, which must always be of great interest in this country. Our attention has been lately called to the subject by an article in a quarterly contemporary[a], which, although written in a somewhat too eulogistic strain, is yet worthy of remark. It does not contain much information which will be new to our readers, and is incorrect in some of its particulars; but we shall go through it for the purpose of gleaning the few parts which are novel, and of correcting the mistakes which are to be found in it. It commences by stating, apparently as an advantage, that the legal profession in North America is not so influential as in England. "Not only

[a] Westminster Review, No. XXXIII. April 1832.

are the practising lawyers of the United States less influential as a body than the members of the law in England, but they are much less numerous. In England they are in the proportion of one to 1000 souls; in the United States they are as one to 1700 souls. The benches of judges certainly are more numerous there than with us; but the result is, that, with much less litigation, the republicans enjoy more and cheaper justice than is attainable under any system now prevalent in any other part of the world, not, perhaps, excepting even Denmark[b]." The Reviewer then proceeds to state the changes which have been effected in the American law. We shall insert all that is important, making such comments, as we proceed, as may serve to give the reader an opportunity of judging for himself. For although we are sincere friends to the cause, both here and in other countries, we are by no means disposed to give in to that headlong admiration of our transatlantic friends, which occasionally manifests itself in those, we must be permitted to say, who know very little about the matter.

"The Americans (says the Reviewer) took care to simplify the elements of legal transactions, so as to check in the outset the means of accumulating expensive and inconvenient proceedings, which would rapidly and entirely exclude all but the lawyers from the comprehension of their own concerns. Conveyancing was studiously divested of those forms which have been the disgrace of English lawyers for so many years; and before the revolution of 1776 a conveyancer was found willing to do thus for the colonists in his practice, what it has been truly asserted practitioners might do, but which none have been bold or honest enough to accomplish in England. In Boston, James Reid reduced the form of legal instruments to moderate length, so early as the year 1756; and at the present day a deed of lands proceeds from the government expressed in about sixty words, whilst the latest approved conveyance from the crown in an English colony is run out to four times that extent. In an English colony new lands are fettered with half a dozen serious provisoes and conditions; in the United States they are free from all restraint. It requires but slight consideration to comprehend, that where the titles to property begin with so remarkable a difference, the consequence may be traced advantageously to the less encumbered owners, in every transaction in which the property may afterwards be dealt with."

This shews a very great ignorance of the actual state of the facts. There has been no want of writers in England who have been "bold and honest enough" to write and publish books of short forms. The little work of Mr. Coventry has, we believe, had a considerable sale; and all the recent popular works on the subject have aimed at rendering deeds concise: so that "James Reid" may easily find his parallel in our own degenerate country.

"In the other principal branch, namely, pleading, prolixity has been abundantly retrenched, and by ceasing to examine witnesses upon interrogatories in equity and in admiralty causes, more serious benefits have been insured, than saving expense. In the practice of the courts numerous artificial rules are abolished, which were impediments to justice; whilst the officers of the courts have been reduced to the two or three, required for receiving the suitor's complaint, and executing the award of the judge; in the place of that throng of functionaries which in London renders an accurate knowledge of the law offices an acquirement of no small skill, and consequently one for which the suitor has to pay heavily."

We here approve of the Reviewer's remarks, and have not been backward in pointing the way to the fee receivers. Much remains to be done on this head.

"A better illustration of what is good in American jurisprudence cannot be offered, than by stating one or two things long established by it, but which the English law reformers, to whom wild desires of novelty cannot be imputed, are almost in vain struggling to obtain from the anti-reformers amongst ourselves. Of these the registration of deeds and of other legal obligations, is a most striking instance. Throughout the four and twenty states the registration is managed with the greatest ease; and New England enjoyed this admirable means of security against fraud and misfortune so early as in the year 1641. The oldest experience produces no proof of inconvenience in the practice; and perhaps scarcely one lawyer of eminence is to be found in the whole world to give it active opposition. Hitherto, however, parliament has countenanced the opposition to these institutions which are so useful in America, in Scotland, and all over Europe, besides being found to require very little improvement to be of the greatest utility in Middlesex, Yorkshire, and Ireland, are still refused to the other counties. The simple grounds of the registry laws in New England, in 1641, were, That all deeds of conveyance should be recorded, that neither might be defrauded, nor courts troubled with vexatious suits and endless contentions about sales and mortgages. Part of the registration law of New York is inserted in the second Report of the Real Pro-

[b] Whether the state of the profession is better in America than in England, or whether this numerous tribe of judges does in fact give "more and cheaper justice," is considered doubtful by some; as we shall shortly take an opportunity of shewing.

perty Commissioners, from the revised laws of this state."

These are the old arguments in favour of general registry, which have been so often considered.

"The black art of the conveyancers supplies another head of comparison highly favourable to the United States. There feudal tenures, including copyholds, do not exist. With us, one result of the labours of the Real Property Commission is the prolonged continuance of tenures of many kinds; the commissioners having relied perhaps on the enlightened remarks of one of their witnesses, that it is good by such memorials to be reminded of our ancestors. 'In truth,' says this learned person, 'I consider the variety of tenures in the narrow extent in which they exist, as a beauty, and not as a blemish. They illustrate the antiquities, and they confirm the history of the country. They bring home to our apprehensions ancient manners and customs which no longer exist, and set before our eyes a faint, but interesting picture of feudal relations. All this may be prejudice; but I own I should be sorry to see all these venerable remains sacrificed to a dry and barren uniformity.'"—*Appendix to the First Report on Real Property*, p. 100.

"Of tithes too, and the multitudinous evils which they occasion, the United States have known scarcely the rumour, although Charles I. once seriously aimed at fixing the burthen upon them. What little of tithes was introduced into Virginia, the revolution of 1776 abolished; while to their supporters on this side the Atlantic it seems a light thing, to be risking revolution rather than submit them to a reasonable settlement.

"The complete separation of the office of the higher judges from the legislative and executive powers, is a more striking excellence in the United States since their independence. In the adjoining English colonies the greatest inconveniences arise from perseverance in the old practice, and at home many evils are daily experienced from the political character of the chancellor, of some of the chief judges, and of the recorders in great towns. The error is, however, still unchecked, in most instances in America, of having several judges at each bench; especially at the Supreme Court at Washington, which is composed of seven members, of whom four must be generally present. At the same time the rapidly improving system of reporting the causes by stipendiary as well as voluntary reporters, and an extending practice of requiring judges to assign reasons in writing for their decisions, together with the popular tenure, direct or indirect of the office, tend powerfully to check the evils attendant on a numerous judiciary in an American court.

"We have said that the practitioners of the law in North America, do not possess an inordinate weight in public affairs. It may be added, that the way in which such practitioners are admitted to their duties, and the checks to which they are subjected, have a strong tendency to bring them under a fitting subserviency to the public interests. There is no such aristocratical distinction known in the United States, as that between the English barrister and the attorney; and if a litigant party prefers to be represented by a private friend in his suit, it is at his option to give such private friend a special authority to appear for him in the court, although he may never have been invested with a legal character. If we mistake not, the law business of any country will be done at the least expense, where the division of law labour is left to the public demand, in the place of that artificial arrangement at present prevailing in England; and it seems impossible to be doubted, that the characters of the practitioners in any profession will in all respects improve, where inefficiency can be punished by the entire desertion of the employers. If the artificial division be thought likely to confer superior skill, higher character on the higher ranks, it must necessarily, in the same proportion, degrade the subordinate members; and it is open to serious doubts, whether in the balance of advantages and disadvantages, it be not better to have the mass free from a dangerous inferiority, than that any should receive an artificial elevation which cannot of itself ensure personal worth.

"Eminent writers, in the United States, have fairly vindicated their countrymen from the reproach of neglecting to improve their jurisprudence. If, as all grant, much remains still to be done by them, by no people has so much been accomplished in the short time during which they have been free agents. The true intent of the constitution was never allowed them whilst connected with England; but the separation of 1776 was rapidly followed by extensive law reforms. President Jefferson has recorded an example of vigour in this respect, which deserves to be commemorated. 'Before the revolution, a judgment could not be obtained under eight years, in the Supreme Court, where the suit was in the department of the common law; which department embraces about nine-tenths of the subjects of legal contestation. In that of the Chancery, from twelve to twenty years were requisite. The reformation of this was among the first works of the legislature after our independence. A judgment can now be obtained in the Supreme Court, in one year, at the common law; and in about three years in the Chancery. Being best acquainted with the administration of justice in Virginia, I confine myself to that; but I think it probable that it is much on the same footing through all the states.' [*Jefferson's Memoirs*, Vol. I. p. 368. A. D. 1785.] President Jefferson made great exertions in the very heat of the revolutionary war, to promote law reform. He was an active advocate for codes; and did much to annex juries to the Chancery Court, a measure successfully adopted in many cases."

We can assure the Reviewer that, if he

would only take the trouble to enquire, he would find that it is not a very rare thing in this country to obtain a common law judgment in one year, or one in Chancery in three. On the contrary, as all our readers know, it is very frequently obtained in much less time.

"The books on jurisprudence and law, published before and after the war, are striking illustrations of the American legal character, affording a just estimate of what this people have effected in the first fifty years of their independence, and of what may be expected from their future efforts in jurisprudence."

The principal American law books are then enumerated, and the labours of the transatlantic lawyers are much dwelt upon and eulogized. As to this we have only to say that, although they have written a good deal, no one author has produced a standard work. And we may here notice, that every English legal publication is reprinted in America; and it is not very creditable, either to the American editors or publishers, that this is generally done without any acknowledgment to the English author. We shall here close our remarks, but shall probably soon return to the subject, and notice some late works from which information may be obtained on the subject.

ON THE PROPOSED ALTERATIONS IN THE CRIMINAL CODE.

The subject of the severity of our Criminal Laws has again been brought before Parliament by a petition, praying, in lieu of the punishment of death, for the substitution of such secondary punishment as may prove effectual for the suppression of forgery. A discussion somewhat interesting took place; and it may be acceptable to our readers to notice the opinions in the House of Commons, as exhibited in the remarks made in the course of the consideration of the Petition in question.

On the one hand, among the legal members in favour of an alteration in the law, were the Attorney-General, Dr. Lushington, Mr. Campbell, and Mr. O'Connell; and on the other was Sir Edward Sugden. The lay members who spoke were, Mr. Lennard, Mr. Grattan, Mr. Ewart, Mr. Robinson, Mr. Ruthven, and Mr. Hunt, for the abolition, and Sir Robert Peel against it. There were other members who took part in some collateral parts of the question; but they adduced no arguments on the main point.

A considerable part of the discussion was occasioned by the remarks of Mr. O'Connell, "that after the decision which the House of Commons came to in favour of the abolition of death for forgery, although that decision was rendered nugatory by the House of Lords, he should not envy the feelings of any Judge who might pass sentence of death on a man for forgery." Subsequently he observed, that during the last forty years, there had been only two cases of forgery in Ireland punished with death. It had been said (he observed) that the punishment of death tended to prevent the commission of the crime; but he thought the severity of the punishment rather tended to make the culprit hope for impunity. Besides, he had scarcely ever known a case *where the person imposed on could not have prevented the crime;* but the fact was, the public relied on the severity of the law, instead of their own precautions.

The Attorney-General intimated his intention to introduce a Bill, which should not only go the length of the old Bill, but take away the punishment of death from all cases of coining; and in a subsequent part of the debate he observed, that the result of his own deliberations had been, to convince him that the present state of the law tended to give impunity to those who were amongst the most profligate of all offenders.

Mr. Campbell seems to have approached the true point nearer than any one else. He stated that the line they ought to draw, was, to remove the punishment of death only for those crimes which, by being *attended with personal violence,* excite the general indignation of mankind. This he considered the true criterion. Let them punish with death for murder, burglary, arson, and rape; and then the magistrates who had to carry the law into effect, would be acting in concurrence with the general feeling of the country.

On the opposite side, Sir Edward Sugden maintained, that all persons were not agreed on the abolition of the punishment of death. It was a pure question of expediency. As far as humanity was concerned, all were of the same opinion. If an adequate secondary punishment could be discovered, every body would be willing to concur in the abolition of the punishment of death; but unfortunately they had not yet been able to find such a secondary punishment as was sufficient to deter men from the commission of crime. All their compassion ought not to be on the side of those who broke the law. They ought to feel a

little for those against whom the law was broken. The great mischief of forgery was, that families might, without the slightest fault, be reduced by it from affluence to beggary. They ought to pause well and long, before they consented to the abolition of the punishment of death. The step should not be taken till they could be sure that they should not thereby increase the crime. An unwillingness to prosecute arose, not so much from feelings of humanity, as from a desire to avoid trouble and expense. The persons who committed the offence were persons of some education, and placed in confidential situations, by which means they obtained the opportunity of effecting their object. The last penalty of the law ought not therefore to be taken away, lest, in aggravated cases, they should be without the power of holding out that solemn warning, which was so necessary for the well being of society.

Dr. Lushington observed, that he considered the question was not one of mere expediency, but that the punishment of death should never be inflicted unless it could be proved that the offence was infinitely injurious to mankind, and utterly incapable of being prevented but by taking away life. He knew the mischief and atrocity of the offence—that it was committed by those who had access to their chambers; but that was the very reason why prosecutions did not take place.

Some remarks were made in the course of the debate, on the conduct of the Judges in exercising their painful functions; and Sir Robert Peel bore testimony that no men could be more humane than the Judges—none could be more disposed than they were to give all proper consideration to any case brought before them, and in every instance to lean on the side of mercy.

We have thus given the substance of the argument on both sides of the question. The principle laid down by Mr. Campbell is clear, and probably the safest that can be adopted. The cases alluded to by Sir Edward Sugden, where the suffering of individuals has been extreme, no doubt, should be considered; but to measure punishment by the circumstances of each case can scarcely be practicable, and the principle, if adopted, must be extended much further; for in some instances of ordinary fraud, the entire ruin of the injured party may be the consequence. The rule proposed by Mr. Campbell has the merit of being practicable; and we should think it sufficiently extensive to comprise all the cases which are necessary for the safety of the community. Mr. O'Connell's observation should not be lost sight of—that in almost every case the person imposed on might have prevented the fraud by due precaution. To protect against personal violence is the clear duty of the legislature, by the severest means; but it is fairly questionable whether the law can be called on to assist with its extreme penalties those who have not used due vigilance in their own behalf. We shall watch the course of the discussions on this subject, and bring the main points to the consideration of our readers.

DISSERTATIONS ON CONVEYANCING.

No. IV.

ON THE LIABILITY OF AN HEIR AT LAW TO ELECT.

The case of *Churchman* v. *Ireland*, 1 Russ. & M. 250, decided by the present *Lord Chancellor*, having excited considerable discussion in the profession, it will be useful to inquire into the former cases on the point there decided.

By the Statutes of Wills, all persons (except infants, *femes covert*, and lunatics) having a *sole* estate in fee simple, of and in any manors, &c. in possession, reversion, or remainder, are enabled to devise to any persons (except bodies politic and corporate) all their said manors, &c.; this power of disposition of lands being created by positive statutes, is restrained by them; differing in this respect from a testament, which passes all *personal* property to which the executor, by virtue of his appointment, is a general heir, 1 Russ. 419; whilst a devise is an appointment of particular lands to a *particular devisee*, and is considered in the nature of a conveyance by way of appointment; Eunomus, (Byth. ed.) 230; and upon that principle it is, that no man can devise lands which he has not at the date of such conveyance, *Harwood* v. *Goodright*, Cowp. 90; because there could be no legal conveyance, at common law, of what a man should acquire in future. *Hogan* v. *Jackson*, *Ibid.* 305, and *Butler and Bakers' Case*, 3 Rep. 25, which was decided upon this principle, was followed by *Bunker* v. *Cooke*, 1 Salk. 239, where the devise was similar to that in *Churchman* v. *Ireland*, "of all such sums of money, chattels, and estates whatsoever, wherewith, *at the time of his decease, he should be possessed* or invested." And the Court were unanimous (there having been no republication), that after purchase, estates did not pass; and the judgment was *affirmed by the House of Lords*, upon a writ of error. This principle was carried still further, in *Swift* dem. *Neale* v. *Roberts*, 1 W. Bla. 476; where it was held, "that an existing estate, in

joint-tenancy, could not be made the subject of a devise;" and Mr. Justice *Wilmot* held, that the time of making the will was the material time, as well with regard to the quality of the estate, as to the personal ability of the testator; for he must have the estate, in order to *be capable of devising it*; and although the joint-tenancy be avoided by an incident which *has relation* to the original commencement of the tenure, and operates so as to avoid it *ab initio*, yet such relation will not give efficacy to a will made when, in consideration of law, the tenure was joint, 3 Rep. 25; upon which point the Court of King's Bench were divided, and the case was afterwards argued in the Exchequer Chamber, where judgment was given against the devise, the Judges stating, "that they were to consider what estate the devisor had in the land at the time of the devise made;" and although a testator held lands on a mortgage title, yet, if he purchased the equity of redemption after the date of his will, they would not pass by it; *Strode* v. *Falkland*, 3 C. C. 99; or fore-closed; nor would they have done so, if he had been in the *actual* occupation of them, as mortgagee in possession.

To these authorities must be added, *Alleyn* v. *Alleyn*, Moseley, 262, where a testator gave his personal estate to his executors, to be laid out in a purchase of lands, to be settled in trust for his grandson; and afterwards, having entered into articles for the purchase of an estate, and dying before the conveyance, the purchase was completed out of his personal estate; upon which the plaintiff, who was the testator's heir, filed her bill, to have the estate re-conveyed to her; and, in the argument for the plaintiff, it was stated to have been settled, in the case of *Sir Owen Buckingham*, where the devise was of all the hereditaments the testator should be seised of, that the hereditaments whereof he was not seised at the time of the making his will, would not pass; and his Honour the *Master of the Rolls*, in his judgment, said, "I am of opinion that the plaintiff is entitled to this estate contracted for, and the purchase whereof was completed by the executor; and though the conveyance was taken by the executor in his own name, he is only her trustee. The counsel for the defendant does not deny that it ought to be considered as real estate, if it was not for the directions of the will to lay out the personal estate in lands."

In the case of *Commissioner Trimnel*, who contracted for lands at a future day, and then devised all his lands, Lord *Harcourt* held, that all the lands covenanted for would pass; which strongly proves that lands contracted for are to be considered as purchases: and then it is clear that these hereditaments, being contracted for after the making the will, will not pass by it. The case of *Sir Owen Buckingham* was adjudged on an ejectment in the Court Common Pleas, and afterwards on another ejectment brought in the Court of King's Bench, and that judgment was affirmed in parliament, on a writ of error; and therefore, since these lands will not pass by the will, and must be considered as part of the testator's real estate, they must descend to the plaintiff, his heir, and she cannot be defeated of them but by the express words of the will, or by necessary implication: and I think the words of the will, that the residue of his personal estate shall be invested in lands, &c. is not either an express disinheritance, or by implication. The personal estate is not to be considered as it stands at the time of the making of the will, but at the time of the testator's death; because till that time it is in a constant fluctuation; but so much as would serve for the purchase of these lands, lost the quality of personal estate, in this Court, at the time of his death, and became real estate; and he has shewed his intention to alter the nature of this estate, having, by a subsequent act, controlled his will as to so much; and this is clear from hence, that if he had lived to complete the purchase, the lands would not have passed as real estate, because the purchase was subsequent to his will; nor as personal estate, because the nature of it was altered, and the accident of his dying before the purchase was completed makes no alteration. So here is no ground to say it was *his intention* to give all his real personal estate; because he was going to apply part of his personal estate in such a manner that it would not have passed by this will, either as his real or personal estate; and it would be the same thing if he had given the defendant all his real and personal estate; for his intention plainly appears, to take so much out of his personal estate; and he shews no design to pass it as his real estate, because, by law, it could not pass by this devise.

Equity, however, has so far modified the strict rule of law, as to admit, under the following special circumstances, a devise of *lands purchased by parol*, to pass by a will made before the conveyance thereof was executed. The contract being made in 1744; the will executed in 1745; a bill filed and the Master's report upon the compact obtained, and the conveyance engrossed in 1746, and a codicil executed republishing the will, in 1747; *Potter* v. *Potter*, 1 Ves. 437, wherein *Sir John Strange*, M. R. held, "That although the agreement was not reduced into writing, yet it was well known that if confessed, or in part carried into execution, it would be binding on the parties; and here was the fullest admission thereof; and as the will was republished by the codicil, it would pass this estate." That there must, however, have been either express articles, or a positive agreement for the purchase, before the date of the will, to pass estates conveyed after, is evident, from *Longford* v. *Pitt*, 2 P. W. 629, in which it appeared that Governor Pitt, having previously made his will, entered into articles for the purchase of lands; and the question being, whether or not they passed thereby, it was held by the *Master of the Rolls*, and affirmed by the *Chancellor*, that they did not.

Instead of citing a number of authorities in support of the rule, "that Equity follows the Law," that of Lord *Eldon* alone may be produced, who, in *Bland* v. *Lamb*, 2 J. & W. 405, after

stating what the doctrine of a Court of Equity, with respect to personalty, was, as before is mentioned; viz. that by a gift thereof, not only the property which the person then had, but all which he might afterwards acquire, would pass, added, "With respect to real estate, the doctrine is just the other way; and the Court is not able to apply the rule of intention, because the capacity of devising is limited to what the party may happen to possess at the time." And if a testator was to give, not only what real estate he had, but also that which he might have, the former only can pass.

Hearle v. *Greenbank*, 3 Atk. 897, has been pressed into the authorities upon the doctrine of election, although so incumbered with the question of infancy, that that of election can hardly be said to have arisen; it shews, however, the inconsistency of rejecting the will of an infant on the deferential ground to the statute of inability to devise, and the setting up the ability of a testator to devise lands of which he *was not possessed*, or in any way interested, in opposition to words as equally express in the same statute.

In *Noys* v. *Mordaunt*, 2 Vern. 581, which is described as a leading authority upon the doctrine of election, the question was, whether an heir in tail could claim certain lands settled on her father's marriage, and devised by him to her sister who died without issue, together with the benefits given her by his will; and it was held that she could not. The general principle deduced from this case, as a conclusion of equity, *is*, that whenever any person has a claim upon a testator's estate independent of him, and also a repugnant claim under his will, he must elect between them;—equity considering such devise to be upon an implied condition, that the devisee shall abandon his original and paramount title, or waive that by devise. In *Boughton* v. *Boughton*, 2 Ves. 12, there was an express condition not to dispute the will, which was not executed to pass the real estate, which was claimed by the legatee, (who had become the heir at law,) as well as the legacy; and the Court, holding that the conditional clause was annexed to the legacy, was enabled to read the whole will: and it was held, that she could not receive any benefit from a part without giving effect to the whole; and that, therefore, she was bound to elect between the inheritance and the legacy. In *Streatfield* v. *Streatfield*, Ca. T. Talb. 176, it being held, that a *settlement* made on the marriage of *T. S.*, the grandfather, was not a due execution of his marriage articles, and he having afterwards, but erroneously, levied a fine of the lands comprised therein, and devised a part thereof to his two daughters, and made a general devise to his grandson, who was the heir in tail under the articles; the question was, whether such devise should be taken by him as a satisfaction for what he was entitled to under the articles, so as to put him to his election: and it was held that he must elect.

The three last cases are noticed here more principally, because they were the leading ones referred to in *Thellusson* v. *Woodford*, 13 Ves. 209, which was the authority relied upon in *Churchman* v. *Ireland*, than from their particular aptitude to the point in that case. It will be observed, however, that in *Noys* v. *Mordaunt*, and *Streatfield* v. *Streatfield*, there were independant titles prior to the will; and that it is laid down in *Crosby* v. *Murray*, 1 Ves. jun. 561, as a principle of equity, that "an election *can only take place* where a person *has a decided interest* BEFORE, and something is left to him BY *will*; and that where there is no CERTAIN BENEFIT BEFORE, THERE CAN BE NO ELECTION, and the particular property, the *subject* of the gift, *must* be in contemplation. *Druce* v. *Dennison*, 6 Ves. 401.

[*To be concluded in the next.*]

ON THE STAMP DUTY ACTS.

No. IX.

AGREEMENTS.—COGNOVITS.

In our previous paper we have shewn the effect of stamp duty charged upon agreements *under hand* only, as regards landed property. We now proceed to consider this duty as to its general effects.

It has been matter of complaint, that when an alteration of stamp duty occurs, there is a want of sufficient notice and publicity, and, consequently, that many instruments have been executed on wrong stamps. This leads us to advert to a provision of stamp law yet in force, which requires proclamation to be made of every alteration of stamps, to the end that all persons may have due notice thereof. And on receipt of such proclamation, every mayor, chief magistrate, or head officer of every city, &c. is to cause the same to be published on the day of the next market, or on the next Sunday in the church, under the penalty of 200*l*.

How essentially requisite such a proclamation is with respect to agreement stamps, must be evident, when we consider the very extensive ramifications of this duty among society. The proclamation was formerly deemed of consequence; for we find by 10 A. c. 19, that doubts had arisen whether the judges were judicially bound to take notice of it; and thereupon it is enacted, that all Courts of Justice and Judges whatsoever ought judicially to take notice of the same proclamation.

We have seen that, by the terms of the enactment, it is declared, that an agreement *under hand only*, is of a measurable nature, both as to value, as to quantity of words, and as to stamp duty. The words we shall now refer to are, "*where the matter thereof shall be of the value of* 20*l*. *or upwards*." Upon this point questions have arisen, how is this value, in many cases, to be ascertained? And parties are induced frequently to pay stamp duty, in order to guard against future difficulties: the words are ambiguous, and leave the objecting party to make out the affirmative. The follow-

ing heads of cases will, perhaps, assist the elucidation of this point.

In *Morgan* v. *Amos*, 2 M. & R. 180, where the subject matter of an agreement is a *limited interest*, worth less than 20*l.*; in a thing worth more than 20*l.*, it was held, that the agreement did not require a stamp.

In *Amos* v. *Hill*, 2 B. and P. 150, an agreement to confess *a judgment* for 30*l.*, to secure 5*l.* by instalments, and costs: held, not to be an agreement for more than 20*l.*, and therefore, did not require a stamp. See also *Jay* v. *Warren*, 1 C. and P. 532.

In *Latham* v. *Rutley*, 1 R. and M. 13, a memorandum given by a *carrier*, on receipt of goods, in these words, "Received of *L.* a paper parcel, directed to *A.* and Co. of, &c. value 26*l.*, which we agree to deliver to them tomorrow, fire and robbery excepted,—carriage paid here,"—was held to be admissible in evidence without a stamp, as being an agreement, the subject matter whereof [*i. e.* the price of the carriage] did not amount to 20*l.* And on the same principle, in the case of *Chadwick* v. *Sills*, 1 R. and M. 15, where a *wharfinger* gave a memorandum on receipt of goods to be shipped in a particular manner, a like decision took place.

In *Emmerson* v. *Heelis*, 2 Taunt. 38, if an interest in land be of the value of 20*l.*, an agreement for it requires an agreement stamp. If, on a sale by auction, the same person is declared the highest bidder for several lots [not purchased in succession, but other purchasers intervening], a distinct contract arises for each lot; and although all the lots together amount to a greater value than 20*l.*, no stamp is required, if the lots were separately of less value than 20*l.*

In *Orford* v. *Cole*, 2 Stark. 351, letters containing a *promise to marry*, were declared not to be within the meaning of the act, and to be good evidence without a stamp.

The next portion of this law, to which we shall advert, relates to the time within which an agreement may be stamped, *after being signed*, without payment of a penalty of 5*l.*

It is enacted, that no memorandum or agreement, *under hand only*, shall be deemed void if *stamped* within 21 *days* after the same shall have been entered into; *i. e.*, *after being signed*. In consequence of the provisions of 48 G. 3, c. 149, and 55 G. 3, c. 184 (before quoted) this enactment must, however, be understood to apply only to agreements *liable to 20s. duty*; because it is declared, that agreements liable to a *higher duty* come under the law of *Deeds*, and must be stamped before they are signed;—that the amount of stamp duty is thus to define what is a deed and what is not, is a strange anomaly. We have our judges endeavouring to expound the laws so as to guide men correctly, and a revenue act putting forth doctrines diametrically opposite; for it must be observed, that the statute recognizes an agreement *under hand only*; not one under seal, which it charges with this higher duty. If the legal operation of an instrument is thus to be measured by the quantum of duty imposed, all legal study will be in reality simplified.

The necessity for the provision to stamp agreements, after being signed, is imperative and unavoidable; at an auction, for instance, the result of that auction can alone determine the call for stamps; with a numerous train of other ostensible reasons.

It is, however, dangerous to omit the stamping of an agreement, for we shall find by a few cases here quoted, that if it be *lost* whilst it remains unstamped, parol evidence cannot always be admitted of its previous existence, or of its contents; and, consequently, no remedy can be had against its infraction by either party.

We first notice *Burton* v. *Kirkby*, 7 Taunt. 174, and 2 Marsh. 480; where it was held, that if the instrument was *stamped before* it was *produced in Court*, it would be efficacious from the time of its commencement, because the stamp is retrospective.

In *Rippiner* v. *Wright*, 2 B. & A. 478, an agreement on *unstamped* paper having been *destroyed*, it was held, that parol evidence could not be given of its contents, although it might have been destroyed by the wrongful act of the objecting party.

In *Rex* v. *Castle Morton*, 3 B. and A. 588, an *unstamped* agreement for letting a tenement at a certain rent having been *lost*, it was held, that parol evidence of its contents was inadmissible, even to prove the value of the tenement.

In *Brewer* v. *Palmer*, 3 Esp. Rep. 213, and 1 N. R. 273, where the agreement was *unstamped*, a landlord was not allowed to enter into parol evidence of, or to recover for use and occupation.

Now if we consider agreements generally; the mischief, perplexity, and inconvenience the duty charged thereon has occasioned society, will be apparent. So far as stamp law affects the validity of the instrument as the evidence of a contract, it is to be observed, those only are required to be stamped, which are *signed* in this country; for an agreement, if it be actually signed *in another country*, and be in all respects conformable to the laws of that country, no subsequent act is required to render it effectual here. This position is sustained by the cases of *Alves* v. *Hodgson*, and *Jordaine* v. *Latchbrooke*, 7 Durnf. and East, 241 and 601; *Clegg* v. *Levy*, 3 Camp. 166; *Smith* v. *Mingay*, 1 M. and S. 87; *Cruchley* v. *Mann*, 1 Marsh. 29, and 5 Taunt. 529; and *James* v. *Catherwood*, 3 D. and R. 190. And the same rule applies where an agreement was made in the *open seas*, belonging to no country, as see *Zimenes* v. *Jacques*, and *Winbled* v. *Malmberg*, 1 Esp. Rep. 311 and 454.

The questions to which this duty has given rise are extremely numerous, and mixed up with bills of exchange, promissory notes, receipts, and many legal points. We select a few heads of cases besides those already stated, *viz.*:

Knight v. *Crockford*, 1 Esp. 190; if a contract is signed by one party, and, *previously* to

the accession of the other party, a *new stipulation* is inserted, the agreement is held to require but one stamp.

Waddington v. *Francis*, 5 Esp. 182. If it appears, that originally two distinct agreements were written on the same paper, and that one of them is *erased*: it was held, that one stamp was *prima facie* sufficient; and that the objecting party must shew both agreements were on the paper when the stamp was affixed.

Smith v. *Nightingale*, 2 Stark. 375. An instrument by which one party *promised* to pay 65*l*., and also such other sums as by reference to his books he owed to another, with interest; was held to be an agreement, and *not a promissory note*, even as to the 65*l*.

Drant v. *Brown*, 5 D. and R. 582, and 3 B. and C. 665. Where a proposal was made in writing by *A*., to let to *B*. a piece of land for making bricks, on terms contained in a written agreement, duly stamped, existing between *B* and *C*., for letting other land: and at a subsequent time *A*. verbally agreed, that *B*. should have the lands upon the terms proposed: it was held, that the written offer made by *A*., being a mere *proposal*, was admissible in evidence without being stamped.

Bingham v. *Cartwright*, 3 B. and A. 326. Where upon letting of premises to *B*., a memorandum *unstamped* was drawn up and read over and assented to by him, and agreed that he should, on a future day, bring a surety and sign the agreement, neither of which he did: it was held, that the memorandum was *not an agreement*, but a mere unaccepted proposal; and that the terms might be proved by parol evidence.

Williams v. *Sawyer*, 3 B. and B. 70. Held, that an agreement, stamped with a 20*s*. stamp, between landlord and tenant, that landlord should have immediate possession of farm, &c. which had been occupied by tenant for a term, the landlord to take the stock, and the tenant to hold one half the house, &c. till 25th January following, without rent, &c. was inadmissible in evidence, on the ground that it operated as a surrender of term, and *required a deed stamp*.

Smith v. *Oator*, 2 B. and A. 778. A *letter* from a principal to his factor, containing bills of exchange, drawn upon the latter, and in which the principal promised to provide for the bills, if certain goods then in, or about to be placed in the factor's hands, remain unsold at the time of the bills falling due, *requires to be stamped as an agreement*; the primary object of such letter not being the sale of goods, but the obtaining an advance of money on the goods.

Clayton v. *Bartenshaw*, 7 D. and R. 800, and 5 B. and C. 41. *A*., by instrument under *seal*, agreed to take fixtures, &c. at a *valuation* to be made on a *future day*. This instrument was said *not* to be an absolute *conveyance* of a present interest.

Wilmot v. *Wilkinson*, 6 B. and C. 506. *A*., in consideration of 7000*l*., agreed by writing, *under hand only*, to present to a rectory, on the next avoidance, such person as *B*. should nominate, and to furnish an abstract, and execute a conveyance of the next presentation to *B*.; this instrument was held to be an agreement *not* requiring an *ad valorem stamp*.

Mullett v. *Hutchison*, 1 Man. and Ry. 522, and 7 B. and C. 639. The following *unstamped* paper, in the hand writing of defendant, was held to be *admissible* in evidence, without an agreement stamp: "Sir,—I have in my hands three *bills*, which amount to 120*l*. 10*s*. 6*d*., which I have to get discounted, or return on demand:"

Bowen v. *Fox*, 2 Man. and Ry. 167. The following letter was held *not* to be *admissible* in evidence *unless stamped* as an agreement: "You will be pleased to receive the register of the brig Gratitude, which I enclose, and which I lodge in your hands as a security for the payment of all demands and charges on account of the said vessel since she has been in this port, and which I hope will be satisfactory to you."

Let us now take under view the instrument denominated a COGNOVIT. Here let us bear in mind, that each shilling charged upon this instrument, is so much drawn from the pocket of some poor debtor. It is not the truly fraudulent debtor who signs a cognovit; but him who desires to pay the demand, although ultimately he perhaps cannot. It is an instrument given by men under great distress, to save from an execution, probably, the remnant of their necessary family furniture; namely, a bed and clothing. Duty, in this case, will surely be allowed a monstrous exaction.

The construction which has caused a cognovit to be charged with the same duty as an agreement, is but slender, as the following cases shew. *Reardon* v. *Swaby*, 4 East. 188, which recognizes the authority of *Ames* v. *Hill*, 2 B. and P. 150; see also *Jay* v. *Warren*, 1 C. and P. 532. If the cognovit stipulates to pay the debt by instalments, and the entire debt amounts to 20*l*. or upwards: then such instrument is said to *require a stamp* as an agreement. But if it be a mere cognovit, without any such stipulation or matter of agreement, then it is said that *no stamp* is required. Nor does a cognovit which merely gives the defendant time, require an agreement stamp. In *Ames* v. *Hill*, the cognovit was unstamped. In that case, Lord *Eldon* said, "We are of opinion that a cognovit requires no stamp; and also that if a paper be a mere authority to enter a cognovit, such mere authority requires no stamp; but that if there be any thing of agreement beyond the mere authority, a stamp then becomes necessary. A cognovit is a mere acknowledgment of an account, and there is no mutuality; but if any terms be added, it then becomes such an agreement as falls within the provision of the act. In this case, we think the paper in question amounted to an agreement; but that within the meaning of the act, it was an agreement for less than 20*l*."

The cognovit is, unquestionably, a part of the proceedings in an action; and since it has been thought right to repeal all stamp duties which applied to legal proceedings, surely this might be construed to be exempted, or otherwise it should be expressly repealed. J. A. H.

[*To be continued.*]

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

PRACTICE.

If a notice of motion to pay money into Court to the account of the suit, expresses a sum certain, the Court will not extend its order to a greater sum, not even to the interest, as it is not mentioned in the notice.

Sir *Edward Sugden* was proceeding to make a motion calling upon the defendants to pay 1500*l.* into Court to the account of the suit, until the cause should be heard, it appearing by their answers that so much came to their hands.

The *Solicitor General* said, Mr. Blewitt offered to pay it in since; but to prevent all difficulties about it, he proposed for him to take six weeks.

Sir *Edward Sugden* thought the offer was made so handsomely, that even in the absence of his client, he would accept it; but it was suggested to him that he ought to have the interest of the sum.

Mr. *Blewitt* said, as this was part of an unsettled account there could be no calculation of interest.

Sir *Edward Sugden* thought there could, for as long a time as the 1500*l.* was in hands.

Mr. *Blewitt* observed, that the notice of motion did not express interest.

The *Lord Chancellor* called for the notice of motion, and finding that it expressed only 1500*l.*, and did not mention interest, he said no more could be asked than was mentioned in the notice.—*M'Cullum* v. —— *and Blewitt.* By the Lord Chancellor, Westminster, April 30th, 1832.

COURT OF KING'S BENCH.

PONE.—SHERIFF'S RETURN.—CONTEMPT.

Where a pone *has issued for the purpose of removing a plaint out of the County Court, and the sheriff has proceeded with the plaint, the defendant, in order to obtain an attachment against the sheriff, must shew that the recognizances required by the* 19 *Geo.* 3. *c.* 20. § 6. *have been entered into by him.*

The sheriff's return to the pone. *"I could not execute this writ, the cause therein alleged for the execution thereof not being true," is bad.*

Alexander shewed cause against a rule obtained by *Channel*, for quashing the return of the Sheriff of Yorkshire to a *pone* issued in this plaint, removing it into the Court of King's Bench, and for an attachment for a contempt in proceeding with the said cause in his County Court, after the delivery to him of the said writ of *pone*. The affidavits, on which the rule had been obtained, stated, that a plaint had been entered by *justicies*, in the County Court of the Sheriff of Yorkshire, at the suit of the plaintiff, for the recovery of 6*l.* 1*s.* 11*d.*; that a summons thereon was issued, and an appearance entered; that the defendant, on the 22d of December in the same year, issued a *pone*, returnable on the 15th of January, 1831, directed to the Sheriff of Yorkshire, requiring him to transmit the plaint into the Court of King's Bench; that the Sheriff's return was, "I could not execute this writ, the cause therein alleged for the execution thereof not being true." Interlocutory judgment was afterwards signed, a writ of inquiry executed, final judgment signed, and execution issued against the defendant's goods. The application, so far as it concerns the attachment, must be discharged. The affidavits on the part of the defendant, do not shew that any recognizance was entered into on his behalf to the plaintiff, in double the sum due for the payment of debt and costs, which recognizance is required by the 19 G. 3. c. 70. § 6. in order to remove the plaint out of the inferior Court. By the 21 Jac. 1. c. 23. § 4. it was provided, that "if in any cause, not concerning freehold or inheritance, or title of land, lease or rent, commenced or depending in any such inferior Court of Record, it shall appear or be laid in the declaration, that the debt, damages, or things demanded, do not amount to or exceed the sum of five pounds, then such cause shall not be stayed or removed by any writ or writs whatsoever, other than writs of error or attaint: and if any writ or writs shall be granted or sued forth contrary to the intent and meaning of this act, the Judges of the inferior court may disallow and refuse the same, and proceed as if no such writ had been granted or sued forth." Mr. *Tidd*[a] observed, that "soon after the making of this statute, a method was contrived of removing causes for sums not exceeding five pounds, by setting up an action for a fictitious demand to a larger amount; and then, upon suing out a *habeas corpus*, all the causes were recovered together. To defeat this contrivance, it was enacted by a subsequent statute (12 G. 1. c. 29. § 3.), that the Judges of such inferior courts as are described in the statute of James, may proceed in such causes as are therein specified, which appear or are laid not to exceed the sum of five pounds, although there may be other actions against the defendant wherein the plaintiff's demand may exceed the sum of five pounds." And, lastly, by the 19 G. 3. c. 70. § 6. which takes away the arrest under ten pounds in inferior courts, it is provided, that "no cause where the cause of action shall not amount to the sum of ten pounds or upwards (since extended by the 51 G. 3. c. 124. § 3. to fifteen pounds, and by the 7 & 8 G. 4. c. 71. § 6. to twenty pounds), shall be removed or removable into any superior Court, by *habeas corpus* or otherwise, unless the defendant shall enter into a recognizance to the plaintiff in the inferior court, in two sufficient sureties, in double the sum due, for the payment of the debt and costs, in case

[a] 1 Prac. 406.

judgment shall pass against him." Here the cause of action was under twenty pounds; and no proof being given, that the necessary recognizances have been entered into, the sheriff does not appear to have been guilty of any contempt in proceeding with the plaint. He was bound to proceed if the recognizances were not entered into. The case of *Lee et Ux.* v. *Goodlad*, 4 D. & R. 350, is exactly in point. The marginal note of that case is this: "Where a defendant brought an action in an inferior court for defamation, after entering a common appearance and suffering judgment by default, removed the proceedings by *certiorari*, without entering into any recognizance:—Held, that the case was within the 51 G. 3. c. 124. § 3, and the Court awarded a *procedendo* for the defendant's default in not entering into the recognizance thereby required, the damages being laid only at 13*l*." The Court there observed of the statute, "it extends to all actions brought for the recovery of debts or damages under 15*l*. It is peremptory in providing that no such cause shall be removed unless the defendant shall enter into a recognizance to the plaintiff, in the inferior court, with two sufficient sureties, in double the sum due, for payment of debt and costs, in case judgment shall pass against him; and as the present defendant has not complied with that provision, the *certiorari* issued irregularly, and the *procedendo* ought to go."

Channel, contrà, submitted that it was incumbent on the sheriff to shew that no recognizances had been entered into for the purpose of shewing that he was regular in proceeding after a *pone* had issued.

Taunton, J.—I am very clearly of opinion that the rule, as to the attachment, must be discharged. In order to obtain an attachment, it must be clearly shewn that the sheriff has been guilty of a contempt. But you can't say he has been guilty of a contempt when the defendant has not entered into the recognizances required by the 19 G. 3. c. 20. § 6. In the absence of any proof that the defendant has entered into such recognizances, it must be presumed that he has not. As to the sheriff's return, the sheriff has probably stated a very bad cause for proceeding with the plaint; but that does not prohibit him from shewing cause against a rule for an attachment.

For the attachment, rule discharged.

For quashing the sheriff's return, rule absolute.

BANKRUPTCY COURT OF REVIEW.

SUPERSEDEAS.—PETITIONING CREDITOR'S DEBT.

A bankrupt having attended the meetings of the commissioners, and acquiesced in the adjudication, and allowed the proceedings under the commission to go on without making any objection, the Court would not, at a subsequent period, grant the prayer of a petition by him to supersede his commission, on the grounds of there being no sufficient debt of the petitioning creditor, the Court not being satisfied that that debt could be successfully impeached.

Mr. *Sturgeon*, for the petitioner, the bankrupt.—This is a petition to supersede a commission. There were various dealings between the bankrupt and the petitioning creditor, for which, on stating the account, there appeared to be a balance of 212*l*. due from the bankrupt to the petitioning creditor. On the 3d of December, 1831, the petitioning creditor gave to the bankrupt the following memorandum:—"Having received of Edward Ashton two bills of lading of 130 casks of butter shipped at Lur, in consideration of the money due to me by the said Edward Ashton. "Joseph Linnett." —And the bankrupt indorsed the bill of lading, which the petitioning creditor consented to take in satisfaction of his debt. The agent of the consignor in Holland, stopped the goods *in transitu*, on which the petitioning creditor and the agent agreed to divide the goods; and the petitioning creditor then sued out the *fiat* on the debt constituted by the half of his original debt. The consignor had no right to stop the goods *in transitu*. *Davis* v. *Reynolds*, 4 Camp. 267; and *Cummin* v. *Brown*, 9 East, 506.

The petitioning creditor did not appear.

Mr. *Bethel*, for the assignees.—The question is, is the delivery of these bills of lading sufficient to destroy the debt of the petitioning creditor? Now the bankrupt does not state in his affidavit that he had given any consideration for the goods. The goods did not come into the hands of the petitioning creditor, and the consideration therefore fails. The goods never were in the possession of the bankrupt.

His Honour Sir *Albert Pell*.—They were in his possession, subject to be divested by the stoppage *in transitu* of the consignor, unless he had assigned over the bill of lading *bonâ fide* to a person not having notice.

Mr. *Bethel*.—The bankrupt attended the commissioners; he acquiesced in the adjudication; the commissioners were dissatisfied with his statement of his property, and then he applies to supersede this commission.

Per Curiam.—The bankrupt never stated this objection to the commissioners, but he allowed the proceeding to go on. The bankrupt acquiesced in the proceedings, and we are by no means satisfied that the bills of lading were assigned in consideration of the debt.

Petition dismissed, with costs; and if they cannot be obtained against the bankrupt, then to be paid out of the estate.—*In the matter of Ashton*, May 2d, 1832. B. C. R.

NOTES OF THE WEEK.

House of Lords.

CONTEMPTS IN ECCLESIASTICAL COURTS — PRESCRIPTION — PRESCRIPTION (TITHES). —ANATOMY.—INSOLVENT DEBTORS' ACT CONTINUANCE.

These bills wait for the second reading.

SENTENCE OF DEATH.—REMEDIES AGAINST THE HUNDRED.

These bills wait for the Committee.

CONTEMPTS IN EQUITY.

This Bill waits for the third reading.

House of Commons.

BANKRUPT ACT AMENDMENT.

The further consideration of the report deferred.

PRIVILEGES OF PARLIAMENT.

This Bill has been read a second time, and committed.

WITNESSES IN EQUITY.—PLURALITY OF BENEFICES.

The second reading deferred.

NORFOLK ASSIZES.

This bill has been reported, and ordered to be read a third time.

FINES AND RECOVERIES.—CURTESY—DOWER. INHERITANCE.

Further consideration of report deferred till the 8th of June.

GENERAL REGISTER.

The second reading deferred till the 8th of June.

LIMITATIONS OF ACTIONS.

The Committee deferred till the 8th of June.

STATUTE OF FRAUDS AMENDMENT.—ATTESTATION OF INSTRUMENTS.

Second reading deferred.

BIRTHS' REGISTRATION.

Further consideration of report deferred.

EXCHEQUER COURT OFFICERS.—LUNATICS' COMMISSIONS.

Committees deferred.

USURY LAWS.

The following is the substance of the enacting part of this Bill:

That so much of the existing acts as impose penalties and forfeitures for receiving, or contracting to receive, any greater interest than therein allowed, or as renders void any contract for money, shall be repealed.

That money advanced on *land* shall not bear higher interest than 5*l.* per cent.; nor shall interest accumulate beyond the amount of the principal: and there is a proviso excepting the Pawnbrokers' Act.

The second reading of the Bill deferred till Monday.

ARBITRATION.

This bill waits in Committee.

PUNISHMENT OF DEATH FOR THEFT.

This bill has been considered in Committee, and ordered to be reported.

SIR WILLIAM GRANT.

We regret to record the death of this eminent Judge. It will be our duty to give a full Memoir in our next.

SIR JAMES MACKINTOSH.

Sir James Mackintosh died on Wednesday. We shall also notice his life.

INCORPORATED LAW SOCIETY.

An adjourned General Meeting of the Members was holden on Tuesday the 29th inst., when the Bye-Laws of the Society were passed; and we understand that it has been fixed to open the Building for the use of the Members on the 4th of July, the day before which, the annual accounts will be presented, and the Committee of Management and Auditors elected.

LAW PROMOTIONS.

Serjeants Taddy and Merewether have been appointed Attorney and Solicitor General to the Queen.

CIRCUITS OF THE JUDGES.

Home. Tenterden, C. J., and Bayley, B.
Norfolk. Tindal, C. J., and Gaselee, J.
Midland. Park, J., and Vaughan, B.
Northern. Parke, J., and Bolland, B.
Western. Taunton, J., and Patteson, J.
Oxford. Bosanquet, J., and Gurney, B.
Welch. Lyndhurst, C. B., *North Wales,* Alderson, J., *South Wales.*

ANSWERS TO QUERIES.

COMMON LAW.

ACTION ON BOND. P. 43, *antè*.

1. With regard to *B.*'s right of action against *A.*'s executors, there cannot, I think, be any doubt, inasmuch as supposing the fact of the bond to have run twenty years, and the plea to be "*Solvit ad diem*," I apprehend evidence of interest having been regularly paid, would defeat such plea In the case of *Oswald* v. *Legh*, 1 T. R. 270, the law is briefly laid down by *Buller*, J., respecting length of time being no *legal* bar, but only *ground of presumption* that the debt has been satisfied; of which presumption the strongest evidence would be required. R. B.

2. Presumption of payment of bond upon twenty years, or less, without payment of interest, *unless repelled by circumstances*. *Hillary* v. *Walker*, 12 Ves. 266. See also 1 Ch. Rep. 78, 88, 106. When no demand has been made on a bond for twenty years, the Judge will direct a jury to find it satisfied. *Gratwick* v. *Simpson*, 2 Atk. 144. In this case, however, the payment of the interest up to the obligor's death, is, I think, sufficient evidence of the admission, and nonpayment of the principal secured by the bond; and that an action will lie against the executors for the recovery thereof; or, at all events, that equity will favor the person applying for relief. ASPIRO.

3. The payment of interest is legal evidence that the principal is unsatisfied; and such payment, in this case, having been made within twenty years, the presumptive bar does not take place, and therefore the executors may maintain an action. W. T.

EXECUTOR.—RESIDUE. P. 48, *antè*.

1. As to the right of executors to the residue, it has been held, that where it appears that the testator, by naming an executor, meant to give the office only, and not the benefit arising therefrom, the executor will, by the Court, be considered as a trustee for the next of kin, upon an equity founded on the statutes of distribution. *Southcote* v. *Watson*, 3 Atk. 226. The rule from *Lawson* v. *Lawson*, 7 Bro. Parl. Ca. 511, is a safe guide, *viz.*, that for a legacy to take away the right of the executor, it must be so qualified, that the giving of it is inconsistent, that the executor should take the whole. The proper conclusion seems to be, that where the legacy is consistent with the intent that the executor should take the whole, a court of equity will not disturb his legal right. A CONSTANT READER.

2. This is a question which involves in it several distinctions; the following cases bear upon the point: 1 P. Wms. 550, note 1. 2 Fonbl. Treat. on Eq. 131. 3 Bac. Abr. 67. And 11 Vin. Abr. 407.

The whole personal estate of the testator, in point of law, devolves on the executor; and if, after payment of the funeral expenses, testamentary charges, debts, and legacies, there remains any surplus, it evidently rests in him beneficially. See Toller's Law of Executors and Administrators, chap. 4th, sec. 10. H. B. A.

3. The executor would clearly *not be entitled*. It has been determined by the Court of Chancery, that if there is *no kindred* of a testator, the executor shall stand *trustee for the Crown*, to whom the undevised surplus of the estate would go, as in the case of a person dying wholly intestate. *Vide* Brown's Ch. Rep. 201. F. N. L.

4. R. B. must take care that there is no expression in the will tantamount to the word "residue." A legacy will not take away an executor's right to the surplus, unless such legacy is inconsistent with the supposition that he was meant to take the whole. *May* v. *Lewin*, 2 P. Wms. 158, n. 1. *Nisbett* v. *Murray*, 1 P. Wms. 549. *Abbott* v. *Abbott*, 6 Ves. jun. 225. But the executor is always excluded, when the words of the will indicate an intention to impose a burthen rather than to confer a benefit, whether there be any legacy given to the executor or not. *Urquhart* v. *King*, 7 Ves. jun. 225. *Selley* v. *Wood*, 10 Ves. jun. 71. Where an executor had a legacy for his trouble, parol evidence was admitted on behalf of his co-executrix, an infant, to rebut the presumption of the next of kin; *Williams* v. *Jones*, 10 Ves. jun. 17; and the Lord Chancellor decreed to the infant the whole residue. Unequal legacies given to executors by their own names, will not exclude them from the residue. 1 Bro. C. C. 328. *Griffiths* v. *Hamilton*, 12 Ves. jun. 298. *Rawlings* v. *Jennings*, 13 Ves. jun. 39. Under the circumstances, however, of the case in question, I think the executor must hold the surplus *in trust* for the testator's heir at law, or next of kin, and advertise, in the usual way, *before* he appropriates the same to his own use. ASPIRO.

QUERIES.

LAW OF PROPERTY AND CONVEYANCING.

BEQUEST.—WIDOW.

A. devises personal property to *B.* for life, and after *B.*'s death, to be equally divided amongst *B.*'s children, *C.*, *D.*, and *E.* *D.* dies before *B.*, leaving a widow, without issue. At *B.*'s death, can the widow claim what would have been her husband's share? T. B.

WILL AND CODICIL.

A. made a will, attested by two witnesses, and afterwards made a codicil which was attested by two witnesses, one of whom was a witness to the will; on which codicil was inserted the usual declaration, that it should be considered as part of the testator's will. Will both together make a good will, so as to pass real estate. H. B. A.

MARRIAGE SETTLEMENT.

A wife's portion was secured by a mortgage in fee; she and her husband assign to trustees, to call in the money and settle it on the husband and wife and their issue, remainder to the husband and his heirs. Both husband and wife died without issue. To whom does the property descend—to the wife's executors, or to the husband's? H. B. A.

FEME COVERT.

May a feme covert dispose of a trust raised during the coverture, for her separate use, without the consent of her husband, by way of appointment? H. B. A.

COMMON LAW.

INTEREST.

If *A.* borrows a sum of money of *B.*, and for the security thereof, gives him a bond, promissory note, or any other legal instrument, with a stipulation that the interest arising therefrom shall be paid half-yearly, and neglects payment of the interest when due; can *B.*, in such a case, recover the interest without the principal, in an action against *A.*? M.

TRESPASS.

If *A.* agrees to pasture *B.*'s cattle, and the cattle (on account of the fences being insufficient) stray out of *A.*'s field into *C.*'s, whereby *C.* sustains considerable damage; can *C.* recover damages, in an action against *B.*? or is his remedy only against *A.*? M.

TRADESMAN.—SALE.

Is a tradesman, who places articles for sale in his window ticketed, as to the price, obliged by law to sell those identical articles, so placed in the window, to a customer applying to purchase them? A SUBSCRIBER.

FEME COVERT.—SEPARATE ESTATE.

A feme covert, having a separate estate, and her husband makes use of it and dies; can the wife come in as a creditor? H. B. A.

MISCELLANEA.

SIR WALTER SCOTT ON THE CODE NAPOLEON—FEES OF LAWYERS.

By the implied social contract, an individual surrenders to the community his right of protecting and avenging himself, under the reserved and indispensable condition that the public law shall defend him, or punish those by whom he has sustained injury. As revenge has been said by Bacon to be a species of wild justice, so the individual pursuit of justice is often a modified and legitimate pursuit of revenge, which ought, indeed, to be qualified by the moral and religious sentiments of the party; but to which law is bound to give free way, in requital for the bridle which she imposes on the indulgence of man's natural passions. The course of litigation, therefore, cannot be stopped; it can only be diminished, by providing before-hand as many regulations as will embrace the greater number of cases likely to occur, and trusting to the authority of the judges acting upon the spirit of the law, for the settlement of such as cannot be decided according to its letter. The organization of this great national work [the Code Napoleon] was proceeded in with the caution and deliberation which the importance of the subject eminently deserved. Dividing the subjects of legislation according to the usual distinctions of jurisconsults, the commissioners commenced by the publication and application of the laws in general; passed from that preliminary subject to the consideration of personal rights under all their various relations; then to rights respecting property; and, lastly, to those legal forms of procedure, by which the rights of citizens, whether arising out of personal circumstances, or as connected with property, are to be followed forth, explicated, and ascertained. Thus adopting the division, and in some degree, the forms, of the Institutes of Justinian, the commission proceeded, according to the same model, to consider each subdivision of this general arrangement, and adopt respecting each such maxims or brocards of general law, as were to form the future basis of French jurisprudence. Their general principles being carefully connected and fixed, the ingenuity of the commissioners was exerted in deducing from them such a number of corollaries and subordinate maxims, as might provide, so far as human ingenuity could, for the infinite number of questions that were likely to emerge on the practical application of the general principles to the varied and intricate transactions of human life.

Such was Napoleon's idea, *that advocates and solicitors ought only to be paid in the event of the cause being decided in favour of their client*; a regulation which, had he ever adopted it, would have gone far to close the gates of justice; since, what practitioner would have forfeited at once one large portion of the means of his existence, and consent to rest the other upon the uncertainty of a gambling transaction? A lawyer is no more answerable for not gaining his cause, than a horse-jockey for not winning the race. Neither can foretell with any certainty the event of the struggle; and each, in justice, can only be held liable for the utmost exertion of his skill and abilities. Napoleon was not aware, that litigation is not to be checked by preventing law-suits from coming into Court, but by a systematic and sage course of trying and deciding points of importance, which, being once settled between two litigants, cannot, in the same shape, or under the same circumstances, be again the subject of dispute among others.

The Legal Observer.

VOL. IV. SATURDAY, JUNE 9, 1832. No. LXXXVI.

——— "Quod magis ad NOS
Pertinet, et nescire malum est, agitamus."
HORAT.

JUDICIAL CHARACTERS.
No. VI.

SIR WILLIAM GRANT.

SIR WILLIAM GRANT is one of the few great men of the present, or of any other age, who come to their biographers with characters entirely untainted. Although he passed through the high offices of the state, in one of the most eventful periods of our history, he retired from public life with scarcely an enemy. If Seneca be right, *satis est inimicos non habere*, few men can lay greater claim to this praise. We trace his career in life with the same feelings as if we were journeying through a pleasant country, receiving fresh enjoyment as we proceed, and perceiving new beauties the higher we reach.

Mr. Grant was born at the town of Banff, in Scotland, some time in the year 1749. His father was of the family of the Grants of Baldornie, one of the branches of that great and ancient clan of the Grants who have been so long distinguished in the history of their country. His parents died when he was a youth, and the task of young Grant's education devolved upon an uncle. He soon determined on the profession of the law, as that which best suited his taste and feelings, and directed his attention to the mastery of its principles. He was entered at Lincoln's Inn at an early age; but, we believe, passed no time at a University. He was one of the many instances of the wisdom of this course of education. His whole mind was soon engrossed in the attempt to obtain a knowledge of his profession, and of the actual business of life; and at the age of twenty-five, he was considered competent to fill the situation of Attorney-General of Canada, to which he was accordingly appointed. He immediately left this country for that colony, not having been then called to the bar. He soon obtained undisputed pre-eminence at the Canadian bar, and all his talents were called into active service; and he shewed that, if occasion wanted, he could engage in other duties than those of his profession. He came into office at an eventful period. He found Canada traversed in every direction by the rebellious armies of America, and he was present at the memorable conclusion of their attempt—the siege of Quebec, and the death of Montgomery. Mr. Grant himself was called into active military duty, and commanded a body of volunteers.

He remained in this office for a considerable period, enjoying all the success which could there be obtained; but the state of the colony could not have been very inviting. Probably the disturbance which his favourite pursuits met, and the opinion that he had abilities greater than were necessary for pre-eminence at a Colonial bar, induced him to resign his office of Attorney-General, and to try his fortune in England. Certain it is, that he came to this country, and was called to the bar by the Society of Lincoln's Inn, in the year 1787.

He took his stand in the Common Law Courts, and joined the Home Circuit. The usual fate, however, here awaited him. Nearly unknown in this country, and entirely without the necessary connection to insure an early introduction to business, he went this circuit for several years without obtaining a single brief. How long he

might have remained thus unemployed cannot be said—he might have again sought the more humble but certain success of a colony, had not that opportunity occurred, which is said to come once in every man's life, if he have the ability to avail himself of it. This was the obtaining the attention and friendship of Mr. Pitt. That statesman, then in the zenith of his power and importance, was desirous of acquiring some information respecting the state of Canada, and by mere accident was referred to Mr. Grant, as capable of giving him all that he wanted. A meeting was of course arranged, and Mr. Pitt was immediately struck by the great information which Mr. Grant possessed on the subject, and the correct and able views he took. It immediately suggested itself to Mr. Pitt that this was not a man who must be allowed to remain unoccupied by his country. That great man was entirely free from the narrow feeling of keeping kindred minds from their proper position around him. On the contrary, it is well known how ready he was to bring them forward, and thus serve both them and himself, and the country. The happier days of Mr. Grant now commenced, and the long deserved rewards of his talents soon followed in rapid succession. The only business in which he had been employed at the English bar, was in the House of Lords, on Scotch Appeals. He there obtained the admiration of another great man. Lord Thurlow was struck with his clear and forcible manner of reasoning, and eagerly enquiring his name, subsequently urged his coming to the Equity bar, as most suited for the display of his abilities; boldly prophecying, in his usual peremptory manner, that he must there command the highest honours of the profession.

Thus supported and encouraged, he resolved at once to place himself in a situation in which he must either fail altogether, or obtain leading business; and in 1795 he was appointed King's Counsel. As yet he was nearly unknown to the legal profession, and there was, at first, a backwardness in giving him the lead; but he soon shewed how capable he was of taking and retaining it, although no man probably of his eminence was ever in leading business for so short a period. The friendship and high opinion of Mr. Pitt soon placed him in official situations, which called off his attention from the mere routine of his profession; and yet so high did his character stand, both for learning and amenity, that his rapid success was attended with very little unpleasant feeling. In 1795, with his silk gown, he was appointed Solicitor-General to the Queen; in 1798, Chief Justice of Chester; and, in 1799, Solicitor-General to the King, and obtained the usual honour of Knighthood. He succeeded in this office Sir John Mitford (afterwards Lord Redesdale), who was made Attorney-General.

But Mr. Pitt was not content that he should pursue exclusively the limited duties of his profession. Very soon after their meeting he was returned to the House of Commons as Member for Shaftesbury, and afterwards for Windsor. Here he found himself among no ordinary men; and he was called on to take a leading part among those whose names will not be easily forgotten by their country. Pitt, Fox, Sheridan, Grey, Lawrence, and Dundas, were all in their fullest vigour; but he did not shrink from the encounter. Those who recollect him declare, that although he never forced himself on the House, and did not speak very often, yet he always made a great impression. Whilst Mr. Pitt relied on his exertions, Mr. Fox instantly saw of what consequence they were to the side Mr. Grant espoused; and although his candour forced him to acknowledge his great abilities, yet he used his utmost exertions to weaken the effect of his reasoning. His more usual antagonist, however, was Dr. Lawrence, to whom he was considered much superior.

The bar, however, was soon to be deprived of his exertions as a fellow-labourer, although they were to preserve them in a more important place. The senate was also to lose his active services, although he long continued to sit for his native county of Banff, and occasionally to take part in the debates. He had long been marked as a man to be selected as a Judge; and on the retirement of Mr. Pitt from office, in 1801, his great reason for remaining in political life probably ceased. Lord Eldon, then Chief Justice of the Common Pleas; at this time becoming Lord Chancellor, Sir Pepper Arden, the Master of the Rolls, was created Lord Alvanley, and took the vacant Chief Justiceship; thus leaving the Rolls vacant—a judicial situation, to many the most desirable in the gift of the Crown. To this, then, with the consent of all, and having obtained the respect and esteem both of enemies and friends, Sir William Grant was elevated.

Never was prediction more completely fulfilled than that which forstold his eminence as a Judge. He possessed all the great qualifications for this situation. At-

tentive and considerate, he first deliberately mastered the facts of the case, as related to him by the counsel on both sides, and supported by the pleadings or evidence in the cause. He then applied to them the great doctrines of equity, drawing from an inexhaustible fund of knowledge, both of cases and principles. Whenever a reasonable doubt existed in his mind, he would pause before he gave his judgment; being equally free from any rash conclusion, as from any unnecessary delay. When promptness of decision was necessary, as in the ordinary business of the Court, he was as conspicuous as in those remarkable cases where a Judge has abundant time to settle his opinions, and knowing and considering all that has been said by others on the subject, should lead the way to the true principle on which it should be decided. It was on these occasions that Sir William Grant soared higher than most other Equity Judges. His decisions are those, of all others, the most clear and satisfactory for the guidance of the practitioner. He says neither too much nor too little on a point. He lays down safe practical rules. He unsettles as little as possible, and settles as much as possible; and equity, as a science, is indebted to few Judges in a higher degree than to him. During his time the Court was most conspicuous for the talents which were displayed at the bar; but Sir William Grant was generally able to place the subject in an original view, even after it had been argued by a Romilly or a Leach on the one side, or a Hart or a Bell on the other. Of his judgments, indeed, it is difficult to speak too highly. They are equally important to the student as to the practitioner; and the glowing eulogium which Cicero bestowed on general literature, it would be ingratitude in a lawyer not to confine to them:—"*Adolescentiam alunt, senectutem oblectant, secundas res ornant, adversis solatium ac perfugium præbent, delectant domi, non impediunt foris, pernoctant nobiscum, peregrinantur, rusticantur.*" They are chiefly to be found in the Reports of Vesey and Merivale.

He continued in the situation of Master of the Rolls for more than sixteen years, giving to the profession and the public the highest satisfaction. He had more than once an offer of the Great Seal; but he declined it, being satisfied with the eminence he had so honourably obtained. Having commenced life very early, and been actively engaged for a very long period, he now became anxious to retire in the full possession of his faculties and the undiminished lustre of his career. This purpose he carried into effect in 1817; and we cannot deny ourselves the pleasure of transcribing the address which was presented to him by the Bar on his retirement, running the risk of letting our readers read it once too often,—which we ourselves never can do.

On the 23d of December, 1817, Sir Arthur Pigott, at the rising of the Court, spoke as follows:—

"Upon your retirement, Sir, from that seat of justice in which for more than sixteen years you have presided, the Gentlemen of the Bar attending this Court are desirous of expressing the sentiments with which they are impressed on an occasion of great regret and concern to them, and on which they wish to offer an unfeigned tribute of that respect which you have so abundantly merited, and to which you are so justly entitled.

"The promptitude and wisdom of your decisions have been as highly conducive to the benefit of the suitor as they have been eminently promotive of the general administration of equity. In the performance of your important and arduous duties, you have exhibited an uninterrupted equanimity, and displayed a temper never disturbed, and a patience never wearied; you have evinced an uniform and impartial attention to those engaged in the discharge of their professional duties here, and who have had the opportunity and enjoyed the advantage of observing that conduct in the dispensation of justice which has been conspicuously calculated to excite emulation, and to form an illustrious example for imitation.

"Accept, Sir, the cordial and sincere wishes of those whom you leave devoted to the labours of this place, that, with the gratifying reflections which will be the inestimable reward of so considerable a portion of your life, so meritoriously and exemplarily employed, you may enjoy health and happiness in repose, on your secession from business and labour, from the toils and anxieties of a painful judicial situation, to the importance and eminence of which you have in so great a degree and in so distinguished a manner contributed, and on which you have cast an additional lustre."

To which, his Honour replied,—

"It is impossible that I should not be highly gratified by the favourable opinion which the Gentlemen of the Bar have been pleased to express of my conduct in the situation from which I am about to retire. For this, and every other mark of their regard, I thank them most sincerely. The kindness, the respect, the attention, which I have uniformly experienced from them, will never be obliterated from my memory. My conduct towards them has been only that to which their own merit justly entitled them. I have always found them alike distinguished for their learning and knowledge in their profession, and for the honour and

liberality which they have carried into the practice of it. The approbation of such men is truly valuable,—I receive it with pleasure,—I shall remember it with gratitude. Gentlemen, farewell, my best wishes will ever attend you." (See 2 Meriv. *ad fin.*)

The Equity Bar also begged him to sit for his portrait for the Court; and the fine painting of him, by Sir Thomas Lawrence, which now adorns the Rolls Court, was the result of this application. Sir William Grant, after this, retired nearly entirely from public life. He still continued, for five years after he left the Rolls, to sit at the Cockpit to hear appeals; but in every other respect, he has led, since his retirement, a very secluded life. For many years he resided in the neighbourhood of Walthamstow, and his unpretending manners obtained for him the esteem of the circle with whom he mixed,—not the one as would have been thought that he, who had mixed with the great and learned, would have chosen. He retired in complete possession of all his faculties—

"In the full vintage of his flowing honours
Sate still, and saw it pressed by other hands."

He was much beloved in private, and was always anxious to the last to mix with his former friends, and recal the memory of the past. He was convivial in his habits, and a good constitution enabled him to enjoy the pleasures of the table without inconvenience. He is one of that extraordinary list of eminent men of whom Lord Eldon, Lord Stowell, and Sir John Nicholl, are the most distinguished, who live on, as it were, to shame the degenerate youths of modern times. It is only within the last two years that Sir William Grant had shewn any material symptoms of decay. During that period he lived chiefly at Dawlish, in Devonshire; and, at that place, on Friday the 25th of May, he died, aged 83, and was there buried.

NEW BILLS IN PARLIAMENT.

A BILL TO ALTER, AND PARTLY TO REPEAL, SEVERAL ACTS RELATING TO CONTRACTS FOR THE LOAN OF MONEY AT INTEREST.

RECITING, That the laws relating to contracts for the loan of money at interest have been found inconvenient, and it is expedient that the same should be altered:

And reciting the acts hereinafter enumerated, that is, an act passed in the thirty-seventh year of King Henry the Eighth, intituled, "An Act against Usury," it was enacted, that no person or persons should take or receive, for forbearing or giving day of payment of wares, merchandize, or other things, or by sale or mortgage of lands or hereditaments, above the rate of ten pounds for the hundred by the year, under the penalty of treble the value of the said wares or merchandize or other things, and of treble the value of the said lands and hereditaments, and under pain of imprisonment, and of making fine and ransom at the King's pleasure: Also, another act of parliament, made in the thirteenth year of Queen Elizabeth, intituled, "An Act against Usury," it was enacted, that all bonds, contracts and assurances to be made for payment of any principal of money or covenant to be performed upon or for any usury upon or by loan, or [for] doing of which there should be reserved or taken above the rate of ten pounds by the hundred by the year, should be utterly void; and it was further enacted, that all brokers, solicitors, or drivers of bargains whereon should be reserved or taken above the rate of ten pounds for the hundred by the year, should be punished as counsellors, attornies or advocates, in any case of *præmunire*; and it was further enacted by the said statute, that all usury being forbidden by the law of God, is sin and detestable; that all usury, loan, and forbearing of money, or giving days for forbearing of money by way of loan, for gain, as mentioned in the above recited act of the thirty-seventh year of King Henry the Eighth, whereupon is *not* (*qu.*) reserved or taken above the sum of ten pounds for the loan or forbearance of a hundred pounds for one year, or after that rate, should be punished by the forfeiture of so much as should be reserved by way of usury, above the principal, for any money so to be lent or forborne; and that any person or persons offending against the said act made in the thirty-seventh year of King Henry the Eighth should be punished and convicted according to the ecclesiastical laws against usury: Also, an act made by the Parliament of England, in the twenty-first year of King James the first, intituled, "An Act against Usury," and which said act was made perpetual by an act of the Parliament of England, passed in the third year of the reign of King Charles the First, intituled, "An Act for Continuance and Repeal of divers Statutes," the said rate of interest was reduced to eight pounds for the hundred pounds by the year; and it was enacted, that all bonds, contracts and assurances, by which a higher rate of interest should be secured, should be void; and that any person or persons taking a higher rate of interest, should forfeit the treble value of the monies, wares, merchandizes or other things lent, bargained, sold, exchanged or shifted: Also, an act of the Parliament of England, made in the twelfth year of the reign of King Charles the Second, intituled,

" An Act for the restraining the taking of excessive Usury," the rate of interest was further reduced to six pounds for the hundred pounds by the year; and it was enacted, that all bonds, contracts and assurances, by which a higher rate of interest should be secured, should be void; and that any person or persons taking a higher rate of interest should forfeit treble the value of the monies, wares, merchandizes, or other things lent, bargained, sold, exchanged or shifted: Also, an act of the Parliament of *Scotland*, made in the eleventh Parliament of King James the Sixth, intituled, " It is not lesum to take any greater annual Rent than for the One Hundred Pounds, nor Ten Pounds, or Five Bolles Victual;" it is ordained and declared, that no person or persons, by any block or bargain upon any pledge, or any rents of victual or of money, should take a higher rate of interest or profit for the space of one year, than ten pounds money, or five bolles of victual, and so of greater or smaller sums proportional; and that all persons offending against the said act should be held, reputed, pursued and punished as ockerers and usurers: Also, an act of the Parliament of Scotland, made in the fourteenth Parliament of King James the Sixth, intituled, " For Punishment of committing of Usury," it was ordered, that if any person should commit usury or ocker, (that is to say, should take more profit for the loan of money than ten pounds in the year for a hundred pounds or five bolles victual, and so *pro rata*) he shall be accounted an usurer and ockerer: Also, an act of the Parliament of Scotland, made in the fifteenth Parliament of King James the Sixth, intituled, " Usurie, it is not leasum to take mair annual Rent or Profit, nor Ten for the Hundredth," it is ordained, that no person should take any greater profit or annual rent for the loan of money, than ten for the hundredth, upon pain of confiscation of all their moveable goods and gear, and be otherwise punished in their persons as common ockerers; and that all infeftments, bonds, contracts and obligations made to evade the said limitation, should be void: Also, an act of parliament of Scotland, made in the twenty-third Parliament of King James the Sixth, intituled, " Anent taking of Annual Rents before hand, to be Usurie;" it is ordained, that no person who should lend or advance money, should retain the amount of their lent sums, until the term of payment appointed by their bonds be first come, and that contraveners of the said act shall be punished as unlawful usurers: Also, an act of parliament of Scotland, made in the first Parliament of King Charles the Second, it is ordained, that from thenceforth if a wadsetter retain possession of lands and teinds, he shall be restricted to six *per centum* yearly of free money, and he shall be accountable to the debitor for the superplus: Also, an act passed by the Parliament of *Great Britain*, in the twelfth year of the reign of Queen Anne, intituled, " An Act to reduce the Rate of Interest without any prejudice to Parliamentary Securities," it is enacted, that no person or persons whatsoever, from and after the twenty-ninth day of September in the year of our Lord one thousand seven hundred and fourteen, should take, directly or indirectly, for loan of any monies, wares, merchandizes, or any commodities whatsoever, above the value of *five* pounds for the forbearance of one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time; and that all bonds, contracts and assurances made after the time aforesaid, for payment of any principal or money to be lent or covenanted to be performed upon, or for any usury whereupon or whereby there shall be reserved or taken above the rate of five pounds in the hundred as aforesaid, shall be utterly void; and that all and every person or persons who should take, accept or receive, for the forbearing or giving day of payment for one whole year, of or for their money or other thing, above the sum of five pounds for the forbearing of one hundred pounds for one year, or above that rate for a greater or lesser sum, or for a longer or shorter time, should forfeit the treble value of the monies, wares, merchandizes and other things so lent, bargained, exchanged or shifted: Also, an act passed by the Parliament of Great Britain, in the thirteenth year of the reign of his Majesty George the Third, intituled, " An Act to encourage the Subjects of Foreign States to lend Money upon the security of Freehold or Leasehold Estates in any of his Majesty's Colonies in the *West Indies*, and to render the Securities granted to such Aliens effectual for recovering payment of the Money to be lent, by the sale of such Freehold or Leasehold Estates," the rate of interest at which such foreigners or aliens are empowered to lend money is limited to five pounds *per centum* per annum: Also, an act passed in the Parliament of *Ireland*, made in the tenth year of the reign of King Charles the First, intituled, " An Act against Usury," it was enacted, that no higher rate of interest than after the rate of ten pounds by the hundred, for the year, for the loan of any monies, wares, merchandizes or other commodities whatsoever, should be taken; and that all contracts, bonds and assurances for the payment of any money, by which there should be reserved or taken above the rate aforesaid, should be void; and that any person or persons taking above the said rate should forfeit treble the value of the monies, wares, merchandizes, and all other things so lent, bargained, sold, exchanged or shifted: Also, an act of the Parliament of Ireland, made in the second year of the reign of Queen Anne, intituled, " An Act for reducing the Rate of Interest of Money to Eight *per centum* for the forbearance," the rate of interest was rendered to eight pounds for the hundred pounds by the year, it was enacted, that all bonds, contracts and assurances by which a higher rate of interest was secured should be void, and that any person or persons taking a higher rate of interest should forfeit treble the value of the monies, wares, merchandizes and other things, lent, bargained, sold or shifted: Also, an act of the Parliament of Ireland, made in the eighth

year of the reign of King George the First, intituled, "An Act for reducing the Rate of Interest to Seven Pounds for the One Hundred Pounds, for the Year," whereby it was enacted, that all bonds, contracts and assurances by which a higher rate of interest should be secured should be void, and that any person or persons taking a higher rate of interest should forfeit treble the value of the monies, wares, merchandizes and other things lent, bargained, sold, exchanged or shifted: Also, an act of the Parliament of Ireland, made in the fifth year of the reign of George the Second, intituled, "An Act for reducing the Interest of Money to Six *per Centum*," the rate of interest was reduced to six pounds for the one hundred pounds by the year; and it was enacted, that all bonds, contracts and assurances, whereby a higher rate of interest should be secured, should be void, and that any person or persons taking a higher rate of interest should forfeit treble the value of the monies, wares, merchandizes and other things lent, bargained, sold, exchanged or shifted:

And whereas parts of the said several acts have been found prejudicial; Be it therefore enacted, by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the *passing of this act*, so much of the above recited acts as imposes any penalty or forfeiture on persons receiving or contracting to receive any greater rate of interest than is therein allowed, or as renders void any contracts for money lent or advanced on bonds, notes of hand, bills of exchange, or other personal security, is and shall be hereby repealed.

Provided always, and be it further enacted, That nothing in this act contained shall extend or be construed to extend to alter any of the provisions of the before-mentioned acts, in respect to any contract for the loan of money at interest secured on land: Provided also, That nothing herein contained shall extend or be construed to extend to allow the recovery of any sum for interest upon any debt exceeding the amount of the sum originally advanced by way of loan.

Provided also, and be it further enacted, That nothing in this act contained shall extend or be construed to extend to alter an act of the thirty-ninth and fortieth years of King George the Third, intituled, "An Act for better regulating the Business of Pawnbrokers," or any of the provisions of the said act.

THE REAL PROPERTY BILLS.

FINES AND RECOVERIES.

In our article in No. 79, (Vol. III. p. 399) upon this head, we have noticed that these bills in general have not been framed with sufficient accuracy. We propose, at present, to examine more at large the "Fines and Recoveries" Bill, which, if not the most important of the commissioners' bills, is certainly that from which the most immediate advantage will be derived.

The subject has been properly divided by the commissioners, in their analysis, into three parts; and we would submit that the enactments would be simplified and improved if they formed three separate bills. First,—For the abolition of fines and recoveries. Second,—For the barring of estates tail, and estates expectant thereon, and the enlarging of base fees. Third,—To provide for the separate examination of, and acknowledgment of deeds, by married women.

There is certainly nothing in the bill which renders it necessary to join these subjects together; and it is desirable that our descendants should not be encumbered with enactments relating to fines and recoveries, when they enquire into the mode of barring estates tail.

The modern mode of interpreting various words used in legislation is a very great improvement; but as it has been adopted to avoid useless repetition and tautology, we could have wished that the commissioners had set the example of entirely weeding out unnecessary words from our acts of parliament.

The clause, No. 2, may be adduced as a specimen of how much remains to be done to simplify the phraseology of the acts. The words in italics add nothing to the sense, and the omission of them would leave no ambiguity.

And be it *further* enacted, That after the 31st day of December, 1832, no fine shall be levied, or common recovery suffered *of lands of any tenure*, except when parties *intending to levy a fine or suffer a recovery* shall, on or before the 31st day of December, 1832, have sued out a writ *of dedimus, or any other writ*, in the regular proceedings of such fine or recovery; *and any fine or recovery which shall be levied or suffered, contrary to this provision, shall be absolutely void.*

We need not say, that the bills would be very much improved if thus divested of superfluous words.

In clause 6 it is declared, that this act shall not render valid "any fine or recovery, which, before the passing of this act, any court of competent jurisdiction shall have refused to amend."

This provision will introduce another cause of invalidity of titles; a purchaser will have to make enquiry if a fine or recovery which appears irregular has ever been the subject of an application to the Court. In what manner is he to obtain satisfaction, as no record is kept of unsuccessful motions?

Will not this be a greater evil than to render valid all fines and recoveries where it shall evidently appear that there is "error, misdescription, or omission."

It may be observed, that the definition of certain words in the interpretation clause, seems to render unnecessary several clauses which, to those who examine the bill atten-

tively, appear to be provided for by the simple definition of a word.

In clause 21, allusion is made to the mode of suffering a recovery; this not only appears injudicious, but contrary to the intention of the framers of the bill, who seem to have considered that the barring of estates tail, in future, ought not to be referred to the former practice, which would introduce the necessity of a great deal of learning, by this act rendered useless. A very few words by the author would remove this objection, to which the bill is subject, by some one having introduced the clause into the amended bill, without the sanction of the commissioners who framed the bill.

By clause 33, "the disposition of lands under the act shall be made by any assurance by which a fee simple could have been conveyed." This being a new assurance, it seems right that a specific form should be adopted. It may be a subject of doubt whether any change should be made in the present forms of conveyance; but when a new instrument is created, that ought not to be made subject to similar objections to those made to the present forms.

By clause 38, "no disposition under this act shall be valid unless enrolled in Chancery within six calendar months from the date." A vast addition will thus be made to the fees of the Inrolment Office, the emoluments of which are at present two thirds more than a fair remuneration for the trouble. Is it intended that the present officers should receive them, and thus increase the amount of their claim for compensation in case the Inrolment Office be discontinued upon the establishment of a General Register Office? If not discontinued, is it right that fees, so disproportioned to the trouble, should be paid upon this new business? The enrolling within a limited time is only adding another ground of invalidity of title, which may be caused by inadvertence or neglect. It would be more simple if the deed were declared inoperative until enrolled.

By clause 67, the certificate of an acknowledgment of a deed by a married woman is to be lodged in the Court of Common Pleas. The consequence will be, that to ascertain whether an estate tail has been effectually barred by a married woman, searches must be made in both the Courts of Chancery and Common Pleas. We cannot think this double enrolment consistent with the intention of the act, which is to simplify all the proceedings.

REVIEW.

The Practice of Conveyancing; comprising every usual Deed, analytically and synthetically arranged. By James Stewart, of Lincolns Inn, Esq. Barrister at Law. *Second Edition, corrected and enlarged. Vol. I.* London: Saunders and Benning, 1832.

To the general practitioner there is no department of the law in which the aid of practical treatises is more required, than in that relating to real property. We have made it our business, therefore, to review all the works on conveyancing which have appeared since the commencement of this journal; and, in prosecution of the same plan, we have to direct the attention of our readers to the present publication. We noticed some time ago (Vol. II. p. 68) the third volume of Mr. Stewart's Practice of Conveyancing. The portion of the work of which we then presented an analysis was the most difficult and important of the series; namely, the rules for the preparation and examination of abstracts of title, with the law of evidence connected with the title to real and personal property. We have now to notice the *forms* of the usual deeds, as adopted and improved by the present author. The opinion of the profession regarding the general merit of Mr. Stewart's work, appears to have coincided with our own, by the call which has been made for a second edition, in which the precedents have been carefully revised, and some new ones added.

The object of this volume is, by arrangement and analysis, to compress every usual deed into a convenient compass. The forms have been collated with those generally used in practice, and notes are appended to explain their meaning, or assist their adoption.

The plan of the volume assumes a very scientific shape. It might be usefully consulted by the real property commissioners, in the practical part of their plan for a general registry—particularly with respect to the classification of instruments and the facility of reference. The volume commences with the parts into which deeds are commonly resolved, forming *twelve preliminary dissertations*. Each division is marked with one of the first letters of the alphabet, and subdivided into numbered *placita*. References are made by the letter denoting the division, and the figure denoting the *placitum*.

Deeds are divided into eight classes: 1. Purchase; 2. Mortgage; 3. Annuity; 4. Settlements; 5. Leases; 6. Copartnerships; 7. Debtors and Creditors; 8. Ancillary. Under these classes the several clauses of deeds are arranged, and they are divided into 132 sections, distinguished by the roman numerals, and subdivided into *placita*. A synthesis is added, in which the elements of a great variety of deeds are arranged in order. This will much facilitate the appli-

cation of the forms, and enable the practitioner, on an emergency, to prepare an instrument of some complexity, in an expeditious, methodical, and satisfactory manner.

The mode adopted by the author in referring to the several sections of the precedents, is clearly explained in the preface; and the student and practitioner, by ordinary attention, will be able from these precedents to meet every case in the usual routine of business. As the author observes, "some minute divisions of property may not have been particularly provided for; and the ever-varying wants and wishes of the parties may demand clauses entirely novel: but with the assistance of the forms here given, no difficulty will be found in supplying the first deficiency; and the second, it would have been idle to have attempted to anticipate."

Though the text consists of the forms which we have described, the volume abounds with much of the learning of this branch of law. The notes are copious, both in original disquisitions and the doctrines laid down in the cases which have been decided on the several points in question. The greatest care and research evidently have been bestowed in this as well as the other parts of the work. These notes are distinguished at the foot of the page, by the marginal description of "*practical* directions." We have read most of them, and consider them particularly valuable: so much so that we think, with respect to many of them, they ought to have been thrown into the form of introductory chapters, forming part of the text of the work, instead of the comparatively humble position they occupy as "explanatory notes" to the precedents.

We had marked some passages for the purpose of exemplifying the character of the work; but must leave our readers, by referring to it themselves, to judge of the accuracy of our conclusions. To select a passage from a practical and extensive book, would be like producing a brick to judge of a building. In both cases the whole work must be seen and examined, and its utility judged of by experience.

COURTS FOR THE RECOVERY OF SMALL DEBTS.

QUESTIONS OF THE COMMON LAW COMMISSIONERS.

The following questions have just been issued by the Common Law Commissioners.

1. Does any and what degree of inconvenience, within your knowledge and experience, arise from the delay which intervenes between the commencement of a suit in any of the Superior Courts and a trial at the Assizes? or from the expense of prosecuting an action there or otherwise?

2. Does any and what degree of inconvenience arise from the Court of Assizes being held at one place only for the whole county?

3. In respect of what causes of action, as to nature and amount, is such inconvenience, if any, more particularly felt?

4. What local Courts at present exist within the city of London besides the County Court?

5. What is the extent of jurisdiction exercised by each of such Courts; the average length of time which intervenes between the first process and final judgment, and the average of expenses, &c.

6. Are these Courts, or the County Court, adequate to the due administration of justice, to the extent of their jurisdictions, and satisfactory or unsatisfactory to the public, and for what reason?

7. Are any of these Courts subject to any and what defects or abuses, either as to delay, expense, course of practice, or otherwise?

8. Is any and what effect in your opinion produced by the delay and expense incident to the present system in inducing dishonest men to refuse payment of their just debts, by their knowledge of the difficulty which the creditors will have in enforcing it?

9. In your opinion would it be beneficial that the County Court and the other local Courts should be continued without alteration, or with any and what improvements, or would it be desirable to establish one local Court of general jurisdiction throughout the county?

10. If you think that the establishment of such a general local Court would be desirable, how in your judgment ought its jurisdiction to be limited as to the nature and amount of the cause of action, and what course of practice, times, and places for holding such Court for the trial of causes and other proceedings, &c. should you recommend?

11. Do you, or do you not think it would be advisable under the present or any other system of local judicature, that an appeal should be allowed, upon condition of giving security for debt or costs, or both, or upon any other and what terms, and should such appeal be allowed on law or fact, or both; and to what Court or Courts should such appeal lie?

12. Would there be any and what objection to the trial of issues in actions brought in the Superior Courts, where the cause does not exceed a certain amount, before the sheriff or an assessor to the sheriff at his County Court, the Court being held at such convenient place, or places in the county as may be most convenient for the trial of such cases, with reference to the expense of conveying witnesses or otherwise?

REMARKABLE TRIALS.
No. XI.

GESCHE MARGARETHE GOTTFRIED'S CASE[a].

GESCHE Margarethe Gottfried, living in Bremen, in March 1828, was accused of having caused the death of a number of persons by poison. Before this accusation, she had lived in apparently easy circumstances in the middle ranks of life; her house was elegantly furnished, and her dress and demeanour that of a lady; her reputation was untainted; and the frequent deaths which occurred in her house were ascribed to heavy and unaccountable visitations of God.

Her father was a tailor in Bremen; active and industrious, but stingy, selfish, and inclined to superstition. His religion was of a kind that influenced him as long as its practice did not interfere with his own interests; and he attended church only when he had no work to do at home.

Gesche Margarethe, and her twin brother, were born in March, 1783. These were the only children of their father, and, when about four years old, were both sent to school, where they remained till they were nearly twelve. The commencement of Gesche's career in sin may be dated from her seventh year, and was partly owing to the avarice of her parents. Being allowed no pocket-money, she was unable to appear on an equal footing with her school companions, and she began to steal from her mother small sums at first, but afterwards to a larger amount. This did not long remain concealed from her mother, who, however, ascribed it to the son, who was of a silent bashful disposition, rather than to the daughter, whose manners were frank; and although the mother had afterwards occasion to suspect her daughter, still she could not be certain, so artfully were the crimes concealed. Her father was accustomed to sing a hymn every morning before commencing work, and it frequently happened that his daughter was moved to tears by it. She was, however, of a very contradictory spirit, and her mother had frequent occasion to complain of her conduct. As she became older, she was sent to learn dancing, an accomplishment in which she greatly delighted. She also attended a French class, where another instance occurred of her cunning and vanity: to appear the first of her class, she employed a young man, one of her acquaintances, to write her lessons for her, which she then copied and passed for her own.

Thus her life passed on with little variety till she was twenty years of age, although, when sixteen, she had already received three offers of marriage, which she, or rather her father, declined. She was beautiful, and almost every where beloved and well received.

When about twenty, she received an offer of marriage from a saddler of the name of Miltenberg, which she was induced to accept. This marriage proved far from happy. Miltenberg had formerly been married to a woman who rendered his house a scene of misery and discord, and to avoid her society, he always took refuge in the taverns, and so acquired a propensity to liquor which he could never overcome. He was induced to marry again chiefly by his father, for he had been so thoroughly disgusted with marriage by his former experience, that he had little desire to enter into another contract, and frequent quarrels took place between him and his father on the subject. Gesche evinced no great love towards him, but the riches of the suitor had a powerful influence over the mind of her father, who prevailed on her to accept of the offer.

Miltenberg, however, loved his wife, and the more he had been ashamed of his former wife, the more he seemed to doat upon this one; but he still frequented the taverns, and she was often left without his society or guidance.

They had been four months married when Gesche met Gottfried, her future husband, at a ball; and from that day all her wishes were directed towards him. She now began to colour her cheeks with rouge; hours were spent before her glass, and from her toilet she hurried to her kitchen window, and remained there to see him pass to his counting-room; but Gottfried took no notice of her.

It was about this period, namely in September 1807, that her first child was born. About the same time Miltenberg became acquainted with one Kassou, who used very frequently to visit him, and who soon conceived a liking for his wife, which Gesche did not leave unreturned. Their intimacy always continued to increase, and presents passed between them. Gesche was desirous to present to Kassou a breastpin enclosing a lock of her hair, but did not well know how to express a note which she wished to send along with it. She, therefore, applied to Miltenberg, telling him that she wished to make a present to one of her female friends, and requesting him to write a note to be sent along with it, which he accordingly did. This she copied and sent to Kassou along with the pin.

In 1808 she had a still-born child, and after her confinement began, on account of her thin appearance, to wear not fewer than thirteen pairs of stays, to improve her form. This was not discovered till her arrestment. She now began to be tired of Miltenberg; calumniating him to her parents, and directing her passions sometimes to Gottfried and sometimes towards Kassou. She was obliged to sell several articles of household furniture to pay some of her secret debts, telling her husband that she wanted the money to send to her brother, who was then a soldier in the army of Napoleon, and representing to her mother that her husband had sold them.

In 1810 she had another child, and had no sooner recovered from her confinement, than, being short of money, she resolved to open her husband's desk. To accomplish this she pretended to have lost one of her own keys, and sent for a smith to get the desk opened; she observed narrowly how he proceeded, and after

[a] Abridged from the Phrenological Journal for June.

he was gone, went and opened it, and abstracted ten dollars. Not content with this, she proceeded afterwards to open the desk of a gentleman who lodged in her house, and took away ninety dollars. She remained, however, unsuspected, and a favourite with all her acquaintances; and was for some time cured of stealing by a fright which she got by a very narrow search being made on the desks being broken open.

Her passion for Gottfried increased more and more; and the habits and sickness of her husband gave them many opportunities of meeting. Her husband was intimate with Gottfried, and used to have him very often at his house. But her passion was not confined to Gottfried, it extended also to Kassou; and the necessity of keeping her love for the one concealed from the other, brought her into many petty scrapes. Her fourth child was born in 1813.

Miltenberg was still in her way. She had never loved him, and now that he crossed her path, she began to wish him dead, that she might give free vent to her passion for Gottfried. Miltenberg's father had lately died, and she had observed nothing particularly fearful in death, so that by degrees she accustomed herself to the thought of Miltenberg dying. As he was always in bad health, she began to think that, as his life was only an incumbrance to himself, and an impediment to her, it would be no great sin to help him out of the world. In this state of mind she went to a fortune-teller, who prophesied that her whole family would die before her. She knew that her mother had some arsenic, which she kept for poisoning mice. She accordingly went to her, and saying that she was troubled with mice in her house, asked if she knew of any means of destroying them, pretending that she knew nothing of poison. Her mother put some arsenic on bread, and placed it in the room said to be infested with the mice, warning her daughter at the same time to keep the apartment locked for fear of mischief to the children. A day or two after this, Gesche went into the room and took away the poison, which she scratched from the bread as if the mice had taken it, with the intention of giving it to Miltenberg. Some time afterwards her mother said that she would go and see if the mice had taken the poison. "Oh yes!" exclaimed the daughter, "pray bring me some more;" which her mother did.

She was now in possession of the means of death, but could not, for several weeks, bring herself to the resolution of administering it to her husband.

At last she gave him some, one morning to breakfast, and afterwards another dose in some water-gruel. She could not, however, approach the bed of the sick man; it appeared to her as if he knew that she was his murderer; but this was far from being the case, as he recommended her to Gottfried before he died. The corpse was dreadfully swollen, but no suspicion was excited.

[*To be continued.*]

THE UNIFORMITY OF PROCESS ACT.

Among the defects of our judicial system, there is none greater than the variety and multiplicity of forms for the commencement of personal actions in our Superior Courts. Nothing can be more absurd, than that three courts should all have nearly the same powers, administer precisely the same laws, enforce the same remedies between the same classes of parties, and yet adopt different modes of proceeding, and that with such obstinacy, that should the wrong form be adopted, no redress can be obtained. By introducing the present bill, Lord Tenterden has conferred another obligation on the country, and the profession he has served and ornamented. By it those remedies which were dissimilar in form and identical in substance, are rendered identical in form also; and that which was mere ridiculous fiction is now abolished.

The principal changes effected by the act are, first, the assimilation of the mode of proceeding in all the Common Law Courts at Westminster, whether the party be plaintiff or defendant, and whether privileged or not, whether corporation or hundred, when it is not intended to hold the defendant to bail; secondly, a new process by *distringas*; thirdly, one uniform mode of proceeding in cases where the defendant is holden to special bail; fourthly, the power to outlaw or waive, without suing out an original, with the same effect as it may be done now after suing out an original; fifthly, power to the Exchequer to outlaw and waive, and appoint the officers necessary for that purpose; sixthly, a new form of process against Members of Parliament, under the Bankrupt Act, 6 Geo. 4, c. 16, § 10; seventhly, various regulations concerning the duration, execution, and serving of writs.

We shall notice these various changes at length, and with more minuteness and particularity in our future numbers. We shall also endeavour to shew how they will operate on proceedings in the Common Law Courts.

DISSERTATIONS ON CONVEYANCING.

No. IV.

ON THE LIABILITY OF AN HEIR AT LAW TO ELECT.

(*Continued from page* 73.)

In *Thellusson* v. *Woodford*, which was an identical case in substance with *Alleyn* v. *Al-*

leyn, there was the following clause:—"In case I shall, in my *lifetime*, enter into any contract for the purchase of any lands, &c. and I shall happen to die before the necessary conveyances thereof are executed, I order and direct that all and every such contract or contracts, so entered into by me as aforesaid, shall be completed and carried into execution by my said trustees, after my death; and that the purchase monies for such respective estates shall be *paid* by them out of *my* personal estate and effects, and that the deeds and conveyances thereto respectively shall be made to them, their heirs and assigns; and that they, and every of them, shall stand, remain, and be seised and possessed of all and singular the premises so to be conveyed, upon, under, and subject to such and the same uses, &c. as are in and by this my will limited, &c. of and concerning the estates *hereby directed* to be purchased by and with the aforesaid residuum of my estate and effects, in the manner hereinbefore mentioned." And it appears, from the report, that the testator had made purchases of real estates, which were not completed, to the amount of 30,000*l.*—and the bill which was filed by the trustees, prayed, "that the trusts of the will might be established, and that it might be declared whether the heir at law of the testator was or not entitled to have such contracts completed for his benefit, and to have the purchase money paid out of the testator's personal estate; and particularly that it might be declared, whether the heir was entitled to such estates, and also to the legacy in the said will; and if not, that he might be put to his election." By the decree (which was confirmatory of *Alleyn* v. *Alleyn*) a trust was declared for the heir, reserving the question, whether he was also entitled to the personal bequests; and it having been affirmed in the Lords, upon appeal, the question of election was brought forward upon the petition of the trustees; and Lord *Erskine* (then *Chancellor*), in his judgment, expressly confirmed the principle laid down in *Crosby* v. *Murray*, in stating the rule of the Court, that "a person shall not claim an interest under an instrument without giving full effect to it; if, therefore, a testator intending to dispose of his property, and making all his arrangements under the impression that he has the power to dispose of all that is the subject of his will, mixes in his disposition property that belongs to *another person*, or property as to which another person HAS a right to defeat his disposition, giving to *that person* an interest by his will, *that* person shall not be permitted to defeat the disposition where it is in his power, and yet take under the will." Dissenting from the decision, in *Churchman* v. *Ireland*, (which is grounded upon *Thellusson* v. *Woodford*,) on the several points above referred to, yet assenting to the rule as laid down by Lord *Erskine*, it is submitted to be quite clear, although upon other principles, that *Thellusson* v. *Woodford*, upon the principle "that he who seeks equity must do equity," was a pure case of election—the heir claiming under the will, in insisting upon the legacy given to him thereby; and *also against* it, in insisting upon a diminution of the personal estate, for the purpose of completing his legal title as heir. True it is, that as the special heir, constituted by the law, he had an equitable title, which in the absence of a gift under the will he might (as is evident from the decree declaring the trust in his favour, and which was affirmed in the Lords) have insisted upon having completed for his own benefit; yet, as in all cases of wills affecting personalty, "things are to be taken as they stood at the testator's death," *Stewart* v. *Henry*, Vern. & Scriv. 49, the executors of the testator, whom by their appointment he had constituted his general heirs (subject to debts and the trusts of his will), were so fully entitled thereto, both at law and in equity, that immediately upon his decease their assent was necessary to a specific bequest; it follows, as a necessary consequence, that the claim of the heir to have these purchases completed out of *their heritable funds*, was an interference with them, which put him upon the above rule; and if he had not been put to his election, he would, to the extent so abstracted from their funds in completing such purchases for his benefit, have disturbed the disposition, and consequently disappointed the intention of the testator; Sugden on Powers, 380; of which the will itself furnished unobjectionable evidence. It is true, the question of election was not raised in *Alleyn* v. *Alleyn*, although the testator's intention was, as in *Thellusson* v. *Woodford*, that his lands should be settled; the report in Moseley, however, does not state that the plaintiff took any thing under the will, although from her being appointed executrix it is reasonable to suppose that she did. *Back* v. *Kett*, 1 Jac. 534, is however not only an authority confirming what has been advanced, but bears directly upon *Churchman* v. *Ireland*. In that case *T. B.* desired his executors *to sell whatever real estate he might die possessed of*, and directed the produce to be invested for the *benefit of his children*. Subsequently he acquired by purchase and descent several other estates; and the question was, whether the heir was bound to elect between the benefit given him by the will, and the estates descended: and the *Master of the Rolls*, in accordance with all the authorities, held, he was not bound to do so, he not being to be disinherited *except by express words*; the direction was for his executors to sell all that he should die possessed of—that may mean, all which the will could operate upon; and *Morgan* v. *Morgan*, Mosely, 377, is an authority that a testator *cannot* give any thing by a devise, but that which he lawfully may.

[*To be continued.*]

SUPERIOR COURTS.

ROLLS COURT.

CHARITIES—TRUSTEES—APPOINTMENT OF SCHOOLMASTER.

Where it is not known in whom lands of which rents have been applied to charitable pur-

poses, are vested, the Court will, on petition, make a reference to the Master, under the act 1 *W.* 4, *c.* 60, *for the ultimate purpose of appointing new trustees; in case it appears that the lands were, at some former time, vested in trustees.*

Lands had been conveyed to nine trustees, who were to pay the rents to a schoolmaster whom they, or a majority of them, were to appoint. It was provided, that when the trustees were reduced to four, they should name seven others, who, with them, should be trustees thereafter. The trustees being reduced to four and under, and a vacancy taking place in the office of schoolmaster, the surviving trustees named a schoolmaster. Held, that the appointment could not be upheld; and the Court gave a reference to the Master, according to the act.

This was the petition of two of three surviving trustees of a charity at Haddenham, in the Isle of Ely; and it set forth the decree of certain commissioners of charitable uses, dated the 22d day of October, 1698; reciting, that the churchwardens and inhabitants, as trustees for the poor, had been, time out of mind, seised of two messuages, called the Town Houses, and certain commonable rights; and that under the act for the drainage of the Bedford Level, 131 acres of land were allotted to the Archdeacon of Ely and his successors, and four other persons, in trust for the poor, in right of the said two messuages; and finding that Robert Arkinstall, being seised of several tenements, lands, and marsh grounds in the Isle of Ely, by his will, dated the 1st of April, 1640, gave the same towards the maintenance of a free school at Haddenham aforesaid, to be let by the churchwardens. And further, that the churchwardens should have no authority or power in his freehold tenements and lands, before the parishioners had as much stock in their hands, either in money or lands, as amounted to 20*l.* per annum, with the lands which he gave them; and the commissioners found that the churchwardens and inhabitants, for several years after they became seised, made the rents up 20*l.* a year, which was, for several years, paid to the schoolmaster; but that they had, for several years past, neglected so to do, to the great decay of the school; the commissioners then decreed, that a deed of feoffment should be made to the nine trustees therein mentioned; and that they should lay out three several sums, amounting to about 200 guineas, and therein mentioned, in the purchase of lands in the parish of Haddenham, and take a conveyance thereof to themselves, in trust; and the commissioners decreed, that when so many of them the nine trustees should be dead, as that there should be only four of them living, that then the four surviving trustees, or such of them as should be then living, should, with all convenient speed, make a new deed of feoffment, or other conveyance of the two messuages and parcels of ground, and of the lands ordered to be purchased, to seven other trustees, to be nominated by the surviving trustees, in trust for, and towards the maintenance and relief of the poor of Haddenham; and that the same order should be observed as often as so many of the succeeding trustees should happen to die, as that there should not be above four of them surviving; and it was adjudged and decreed, that the bishop of the diocese should elect a schoolmaster to teach a free school in Haddenham; and that upon the death or removal of the schoolmaster, a new one should, from time to time, be elected and appointed by the trustees, or the major part of them, with the consent of the bishop; and that the rents of the lands devised by the will of Robert Arkinstall, should be disposed of according to his will; and that the churchwardens and parishioners should pay to the schoolmaster so much as, with rents, would make up the clear sum of 20*l.*

The petition then stated, that pursuant to the decree, the 131 acres of land were duly conveyed to the nine trustees named in the decree; and that new trustees had been from time to time appointed, as directed by the decree; and the land had been, from time to time, conveyed to and vested in such new trustees in fee. The last appointment of trustees took place in the month of January, 1805; and by indentures of lease and release, dated respectively the 21st and 22d days of January, 1805, the 131 acres of land were conveyed to nine trustees, of whom the petitioners were two; but this conveyance did not include the Town Houses, nor the lands devised by the will of Robert Arkinstall; nor was it known in whom they were vested; nor were they ever included in the feoffment deeds. The petition then set forth a conveyance in April, 1823, to nine persons, of a messuage and tenement which had been purchased in trust for the schoolmaster, and to be used as a school house, such schoolmaster to be elected as before stated in the decree; but no subsequent conveyance had been made thereof; nor was it known in whom it was vested; yet it had been regularly used as the school house. The petition prayed, that it might be referred to the Master to appoint competent persons to be trustees of the charity estates, including the school house; and also including the property devised by Robert Arkinstall, jointly with the petitioners and John Reed, the other surviving trustees.

One of the petitioners having died, William Pate the survivor, and William Pate the younger, the executor of the deceased petitioner, then presented another petition, reciting the former petition, and stating that the schoolmaster having died, the two petitioners to the former petition gave notice to Read, the other surviving trustee, of an appointment of a meeting to appoint a new master, and that the meeting took place, when several other persons attended claiming to be trustees under some pretended appointment, and elected as master Henry Robinson; and that they then put him in the possession of the school-house, and he had ever since been in the possession thereof. On the 4th of January, 1832, the two petitioners to the second petition gave Mr. Read

notice of another meeting to appoint a master, and the petitioners then met, and appointed the Rev. J. G. Breay, Clerk, master, subject to the approbation of the Bishop of Ely, who had since confirmed the appointment, and praying that the election of Robinson might be declared void, and that that of Breay might be declared to be a good appointment, and that Robinson might deliver up the school to him.

Mr. *Rolfe*, for the petitioner.—This is an application under Sir Samuel Romilly's act, 52 G. 3. c. 101, and the 23d section of the act 1 W. 4. c. 60; the latter meets the case of that part of the property of which there are not now any trustees.

Mr. *Bickersteth*.—The difficulty is in respect of the property derived from Arkinstall. The commissioners found that the churchwardens and inhabitants were seised of that property to certain trusts.

Master of the Rolls.—It must appear that there were trustees, and that they are dead—this doth appear, and I can therefore make the order. Take the order for directions to the Master, to publish advertisements according to the 23d section of 1 W. 4. cap. 60.

Mr. *Rolfe* and Mr. *Bickersteth* then discussed the second petition.

Master of the Rolls.—The only point I have now to determine is, whether a schoolmaster can be appointed when there are only four trustees. I do strongly incline to the opinion that the schoolmaster cannot be appointed when the trustees are reduced to four. The Charity Commissioners having directed that when the number of nine trustees should be reduced to four, seven other trustees shall be appointed, the majority of the four cannot appoint a schoolmaster. Nine trustees must be appointed, and these trustees will have to appoint a schoolmaster; but at present I shall only declare that, according to the decree of the commissioners, there has not been any legal appointment of the office of schoolmaster; and let the Master issue the required advertisements for the representative of the last surviving trustee, according to the act of 1 W. 4. c. 60.—*In the matter of the Haddenham Charity*, April 1, 1832. M. R.

COURT OF KING'S BENCH.

BAIL.—RESIDENCE.

Under the 2 of T. T. 1 W. 4. the actual, and not the constructive, residence of the bail must be stated.

Comyn opposed bail, on the ground of the notice of bail being defective, under Rule 2. Reg. Gen. T. T. 1 W. 4[a]. The notice described the bail as of "Russia Cottage, Streatham." On examination, however, he stated, that during the last three months he had not resided at Streatham, although he rented the cottage; but during that period he had resided at a lodging in the Strand. The rule requiring the residence of the bail for the last six months to be given in the notice, is not satisfied by this description.

Taunton, J.—This rule does not require the statement of the mere constructive residence of the bail, but their actual residence. If it did not, it would open a door to fraud, and would be liable to constant evasion.

Bail rejected. *Anonymous*, E. T. April 18, 1832. P. C.

[a] See Vol. 2. p. 105. 1 Monthly Record, 175.

BANKRUPTCY COURT OF REVIEW.

COMMISSION.—SUBSEQUENT FIAT.

The Court, on the petition of the assignees under a commission against a person in one name, will supersede a Fiat assigned against him afterwards in another name.

This was the petition of the assignees of Peter Wicks, who became bankrupt in January, 1830, and was so adjudicated under a commission on the 2d of February, 1830. In that commission he was described as Peter Wicks, of Pleasant Row, in Holloway Road, Islington in the county of Middlesex, cheesemonger, dealer and chapman. The bankrupt did not pass his last examination. On the 10th day of February, 1832, a *fiat* was issued against the bankrupt by the name of Peter Knox, of Maidstone, in the county of Kent, grocer, dealer and chapman, under which he was found bankrupt. The petition prayed, that the *fiat* might be superseded, and that the goods possessed by the assignees under the *fiat* might be delivered to the petitioners.

The Court called on Mr. *Wigram*, as counsel for the respondents, to begin.

Mr. *Wigram* then cited the case of *Ex parte Lees Poulden*, 16 Ves. 472, and then proceeded. On this case I shall shew to the Court, it cannot give the petitioners the relief prayed; for it will appear by the affidavits, that the persons who were concerned in the commission knew at the time that the bankrupt's name was Knox. On the 28th of January, 1830, they knew his name was Knox; and yet they persisted in their commission, and he was declared bankrupt in the name of Peter Wicks.

Here the learned counsel read affidavits, that some years since, at different places, and up to about twelve months before the commission was issued, the bankrupt carried on business by his name of Peter Knox, which was the name of his parents; it appeared, that at Limehouse and another place, three months at each place, up to June, 1831, he carried on business in the name of "Peter;" at that time he commenced business at Maidstone, and there continued to carry on business in the name of Peter Knox, up to the time of issuing the *fiat*, the solicitors in which have denied, by their affidavits, that they knew Peter Wicks and Peter Knox was the same person, and a principal creditor has sworn to the same effect. Under the commission hardly any property had been got in; and according to the doctrine laid down by Lord *Eldon*, any action brought by the assignees under that commission might be disputed.

The property which the assignees under the *flat* have possessed themselves of, came out of the credit given to the bankrupt by his creditors under the *flat*.

The Court said, that the fact appeared to be, that the bankrupt carried on business in the name of Peter Wicks before the commission issued against him, and the creditors did not know him by any other name, nor were they aware that he had used any other name until after the commission had issued. In former cases, where questions had arisen on two or more commissions against the same person, the Court administering equity, the question had been, whether any negligence was proved against the parties who carried the former commission; but in this case no negligence had been established against them. The Court directed the *flat* to be reversed. The respondents to have their costs.—*In the matter of Wicks*, May 4th, 1832, B. C. R.

NOTES OF THE WEEK.

House of Lords.

INSOLVENT DEBTORS.

The Bill for continuing this Act has received the Royal Assent.

PUNISHMENT OF DEATH FOR THEFT.

This Bill, having passed the Commons, has been read a first time in the Lords.

CONTEMPTS IN ECCLESIASTICAL COURTS.—LUNATICS.—PRESCRIPTION.—PRESCRIPTION (TITHES).—ANATOMY.

These Bills wait for the second reading.

SENTENCE OF DEATH.—REMEDIES AGAINST THE HUNDRED.

These Bills wait for Committees.

CONTEMPTS IN EQUITY.

This Bill waits for the third reading.

House of Commons.

FORGERY.

The Attorney-General has given notice of a motion for leave to bring in a Bill to amend the law for the punishment of Forgery.

WITNESSES IN EQUITY.—LUNATICS' COMMISSIONS.—EXCHEQUER COURT OFFICERS.—ARBITRATION.

These Bills wait for Committees.

PRIVILEGES OF PARLIAMENT.

This Bill is in Committee.

NORFOLK ASSIZES.

This Bill has passed the Commons.

USURY.

The second reading deferred.

BANKRUPT ACT AMENDMENT.

The report to be considered.

GENERAL REGISTER.

This Bill now waits for the second reading.

LIMITATION OF ACTIONS.

This Bill waits for a Committee.

FINES AND RECOVERIES.—CURTESY.—DOWER.—INHERITANCE.—BIRTHS' REGISTRATION.

The further consideration of reports on these bills ordered.

STATUTE OF FRAUDS.—ATTESTATION OF INSTRUMENTS.

Wait for second reading.

THE CHANCERY REFORM BILLS.

We understand that the Bills upon which Mr. Spence is devoting so much labor and attention, will probably be introduced by the Lord Chancellor during the present session, and that they will then be printed, and deferred for consideration till the next Parliament.

The Bill, of which we gave an outline in our last Number, which applies to the taking of accounts of Personal Estates, will we believe be extended to Mortgage Accounts, Trusts, and other cases where a shorter remedy than at present exists is considered essential to the interests of the parties. In estates of small amount, and where the suitors are in needy circumstances, there can be no doubt that the proposed measure is much needed.

We learn that Mr. Spence has invited the assistance of several persons of great practical experience, and there at length seems a probability that something useful will be effected in this department of the administration of justice, regarding which

so long and loud an outcry has been raised on the part of the public.

INCONVENIENCE OF THE COURTS AT WESTMINSTER.

We observe that the Master of the Rolls, as well as the Court of Review, has been subjected to much inconvenience during the present term, by the want of accommodation at Westminster. At no distant period, we hope these and all the other tribunals will sit, both in term and vacation, in the neighbourhood of the Inns of Court. Parliamentary counsel are somewhat accommodated by the Sittings at Westminster; but they are comparatively few, and the solicitors in general would be benefited by the change. The advantage to the suitors would also be equally great, for they would secure a more frequent personal attendance of their legal advisers, than can possibly be obtained at Westminster. We must take leave to reiterate this grievance until redress be obtained.

BANKRUPTCY REGISTER OFFICE.

We have reason to believe that the Lord Chancellor has done all he can to accommodate the practitioners, by affording the means of transacting the business of the Court of Review at the Secretary of Bankrupts' Office, and that it remains with the Court or its officers to avail themselves of the opportunity.

We have already repeatedly pointed out, that the filing affidavits, obtaining office copies, drawing up orders, and all other matters incident to the Court of Review, ought to be transacted near the Chancery offices, where the great bulk of the profession reside, and where even those who reside at a distance are obliged, for other business, to congregate daily.

LAW OF ATTORNEYS.

An important decision was made on Wednesday last, on the Equity side of the Court of Exchequer, namely, that Solicitors in Chancery may practise in the Exchequer, and recover their fees, though not admitted in that Court.

MR. BUTLER.—MR. BENTHAM.

Two other venerable names are to be added this week to our obituary. We have our hands full of biography, but shall soon be able, we hope, to give some account both of Mr. Butler and Mr. Jeremy Bentham.

ANSWERS TO QUERIES.

COMMON LAW.

INSURANCE BROKER'S BANKRUPTCY. P. 48, *antè*.

1. The relative situations of *A. B.* and his broker, seem to me to be simply those of principal and agent; and taking such to be the fact, I conceive the settlement with the underwriters is perfectly conclusive, and consequently that *A. B.* cannot compel them to pay him. R. B.

2. The loss upon the policy was a debt due to the assured from the underwriter; and, supposing the broker authorized to settle it, the settlement would not be binding on the assured, unless it were made by the underwriter's paying the amount in money. It would not be valid, for instance, as against the claim of the assured, if it were made by the underwriter's merely setting off the loss against premiums due to him from the broker. *Scott* v. *Irving*, 1 B. & Adol. 605. W. T.

HORSE.—WARRANTY. P. 31, *antè*.

There can be little doubt, I apprehend, respecting this point; it being perfectly clear, that *C.*, both in his own letter, in general words, warranted the horse, and also in the certificate of the veterinary surgeon (which, I submit, must be taken as his own act), he warrants him sound in every respect. And therefore I consider *C.* indisputably bound and liable, because, in sending that certificate, there could have been no other object than to confirm *C.*'s letter. The general law recognized on this subject is, "that a seller is strictly bound by his warranty, if the horse can be proved to have been unsound at the time of sale." *Vide Fielder* v. *Starkin*, 1 H. Bl. 17; and many other cases reported in the T. R. R. B.

LAW OF LANDLORD AND TENANT.

ASSIGNEES.—NOTICE. P. 64.

In *Carter* v. *Warne*, 1 Moo. & Mal. N. P. C. 481, Lord *Tenterden* was of opinion, that trustees under an assignment for the benefit of creditors, are in the same situation as assignees of a bankrupt, in respect of their liability to landlords. If the assignees, in this case, continue possessed until the end of the term, it can scarcely be doubted that they would be held liable for the rent. But cases of this kind consist too much in minute circumstances to be either stated or answered satisfactorily within the limits of a periodical. I should recommend *A. B.* to lay his case before his pleader. W. T.

LAW OF PROPERTY AND CONVEYANCING.

REGISTRY ACT. P. 63.

The non-registry of a lease is not cured by registering an assignment reciting it. *Vide* Sugden's Vendors and Purchasers. This lease reserves, I suppose, a rack rent, and therefore is not considered within the meaning of the act. But still it ought to be registered, that a proper deduction of title may appear in the registry office. X.

QUERIES.

LAW OF ATTORNEYS.

SOLICITOR.—LIEN.

Has a solicitor any *further* lien on the money received for his client, on account of a verdict in his favor, than for the costs *bonâ fide* incurred in *that* suit? Or can he retain any more, to repay himself for other business done previous to the commencement of the last action? R. B.

EVIDENCE.—PRIVILEGE.

Can an attorney, who has been employed by a bankrupt before his bankruptcy, be examined before the Commissioners, for the purpose of obtaining a disclosure of the bankrupt's effects —he objecting that that which was disclosed to him was a confidential communication? and also, has the clerk of the attorney, who was also consulted by the bankrupt, the same privilege? R.

COMMON LAW.

LAPSED LEGACY.

A., by his will, gives to his wife, for life, the dividends on his stock, with directions to his executors to divide the stock, *after her decease*, into certain portions. One of such portions the testator directed to be given to *E. F.*; but if she were not living at his (testator's) decease, and left issue, such portion was to become theirs. *E. F.* survived the testator; but died before the widow of testator, and left children. As this is an event not provided for in express terms by the will, is the legacy to be considered as lapsed? and, if not, who is entitled to receive it,—the representative of *E. F.*, or the issue she left? A. Z.

FOREIGN DEED.—STAMPS.

Is a deed, prepared in Great Britain, and executed in Paris, liable to stamp duty? and can such deed be made use of as evidence in this country, without the stamp being affixed? A. Z.

HUSBAND.—PROPORTIONATE RENT.

Jane H. is, under the will of her former husband, entitled, "for her own use and benefit, during her natural life, to all the interest of all the money belonging to him in the three per cent. stock in the Bank of England, or any other stock, and all the leases of the houses, &c., for her use and benefit, during her natural life:" and having died between the two half-yearly days of payment of dividends and rents, her husband has demanded a proportionate part of each.—Is he entitled thereto?

MISCELLANEA.

CAPITAL PUNISHMENTS IN AMERICA.

"Once during our residence at Cincinnati, a murderer of uncommon atrocity was taken, tried, convicted, and condemned to death. It had been shewn on his trial, that some years before he had murdered a wife and child at New Orleans, but little notice had been taken of it at the time. The crime which had now thrown him into the hands of justice was the recent murder of a second wife, and the chief evidence against him was his own son. The day of his execution was fixed, and the sensation produced was so great from the strangeness of the occurrence, (no white man having ever been executed at Cincinnati,) that persons from sixty miles' distance came to be present at it. Meanwhile some unco' good people began to start doubts as to the righteousness of hanging a man, and made application to the governor of the state[a] of Ohio, to commute the sentence into imprisonment. The governor for some time refused to interfere with the sentence of the tribunal before which he had been tried; but at length, frightened at the unusual situation in which he found himself, he yielded to the importunity of the Presbyterian party who had assailed him, and sent off an order to the sheriff accordingly. But this order was not to reprieve him, but to ask him if he pleased to be reprieved, and sent to the penitentiary instead of being hanged. The sheriff waited upon the criminal, and made his proposal, and was answered, 'If any thing could make me agree to it, it would be the hope of living long enough to kill you and my dog of a son: however, I won't agree; you shall have the hanging of me.' The worthy sheriff, to whom the ghastly office of executioner is assigned, said all in his power to persuade him to sign the offered document, but in vain; he obtained nothing but abuse for his efforts. The day of execution arrived; the place appointed was the side of a hill, the only one cleared of trees near the town; and many hours before the time fixed, we saw it entirely covered by an immense multitude of men, women, and children. At length the hour arrived, the dismal cart was seen slowly mounting the hill, the noisy throng was hushed into solemn silence; the wretched criminal mounted the scaffold, when again the sheriff asked him to sign his acceptance of the commutation proposed; but he spurned the paper from him, and cried aloud, 'Hang me!' Mid-day was the moment appointed for cutting the rope; the sheriff stood, his watch in one hand, and a knife in the other; the hand was lifted to strike, when the criminal stoutly exclaimed, 'I sign;' and he was conveyed back to prison, amidst the shouts, laughter, and ribaldry of the mob. I am not fond of hanging, but there was something in all this that did not look like the decent dignity of wholesome justice."—"*Domestic Manners of the Americans*," *by Mrs. Trollope.*

[a] The governors of states have the same power over life and death as is vested, with us, in the crown.

The Legal Observer.

VOL. IV. SATURDAY, JUNE 16, 1832. No. LXXXVII.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

CHANGES EFFECTED IN THE LAW DURING THE PRESENT SESSIONS OF PARLIAMENT, 1831—1832.

No. I.

THE SERVICE OF EQUITY PROCESS ACT, 2 W. IV, c. 33.

THIS act is considerably altered from the form in which it stood as a bill. It was passed on the 23d of May last[a], and its provisions are not unimportant to the profession, both in this country and in Ireland: we shall therefore shortly state the former law on the subject, and the alteration effected by the present act, which is entitled "An Act to effectuate the Service of Process issuing from the Courts of Chancery and Exchequer in England and Ireland respectively."

There were two former acts which relate to the enforcing the orders and decrees of the Courts of Chancery and Exchequer of England in Ireland, and of those of Ireland in England. The first of these is the 41 G. 3, c. 90, which enacts, that when upon any account declared or recorded in the Court of Exchequer in England, or on judgment of that Court, any debt shall be due to the King, a copy of such account should, on application, be exemplified and transmitted to the Court of Exchequer in Ireland, where it should be enrolled, and process be issued against the debtor's body and effects there; and the same power is given to the Court of Exchequer in Ireland for obtaining similar objects in England. By § 5 it is also enacted, that where in any suit between party and party, or in any proceeding in cases of minors, bankrupts, or lunatics, orders shall be made for the payment of, or accounting for, money by the Court of Chancery in England, a copy thereof may be certified to the Court of Chancery in Ireland, where it shall be enrolled, and process may be issued to enforce obedience to it; and by §§ 6, 7, and 8, corresponding provisions are made for enforcing such orders made by the Court of Chancery in Ireland, and the Courts of Exchequer in England and Ireland, in the neighbouring country respectively.

The other act on this subject (5 G. 4, c. 111.) was passed merely to amend the last act, and to give the Court of Chancery in Ireland all the powers that were given by the former act to the Court of Chancery in England. It will be seen that neither of these acts contained any provision relating to the service of *process* in suits in the respective Courts of Equity in England and Ireland. The point was incidentally discussed in the recent case of *Houlditch* v. *Lord Donegal*, 1 Beatt. 146 and 390, in which Lord Chancellor Hart, although he admitted that a Court of Equity in Ireland was ancillary to a Court of Equity in England, refused an application for a receiver after answer but before hearing, in a suit to carry into execution the decree of an English Court of Equity. Under these circumstances, Lord Plunkett undertook to bring in a bill to remedy the existing defects, which, it might have been thought, would have been universally admitted. It was, however, opposed with a vehemence bordering upon clamour by Mr. O'Connell, and a great part of the

[a] It will be found, as it was originally introduced, 2 L. O. 340.

Irish bar, as well as by many other respectable persons, and many of its provisions have been omitted; and yet, as far as we can see, the bill originally brought in by Lord Plunkett, and the bill brought in by Mr. O'Connell himself [b], are of the very same nature, and have both for their object the remedy of existing inconveniences in the conduct of suits in the Courts of Equity in the United Kingdom. We shall proceed to give an analysis of the present act, which, as it is *now in operation*, should be familiar to every practitioner.

By sec. 1. it is enacted, that the Courts of Chancery and Exchequer in England may, upon special motion of the plaintiff in any suit which has been or shall be instituted in such Courts concerning lands situate in England or Wales, order and direct that service in any part of the United Kingdom of Great Britain and Ireland, and in the Isle of Man, of any subpœna or letter missive, and of all subsequent process to be had thereon, upon any defendant or defendants in such suit, then residing in such part of the United Kingdom or Isle of Man in which he or they shall be so served, shall be deemed good service upon such defendant or defendants, upon such terms as to such Courts shall seem reasonable.

By sec. 2. the Courts of Chancery and Exchequer of Ireland are empowered, in suits concerning lands in Ireland, to direct process in a similar manner to be served on defendants in other parts of the United Kingdom.

By sec. 3. it is enacted, that along with the subpœna or letters missive, served under any such order of the Courts of Chancery and Exchequer of England and Ireland, a copy of the prayer of the bill shall be served upon every such defendant, and that no process of contempt shall be entered upon any such proceedings as herein-before mentioned, nor any decree made absolute in any of the Courts in England or Ireland, without the special order of such Court, upon special motion made for such purpose; and it is provided, that nothing shall be held to make it compulsory upon the plaintiff in any suit to serve with process or bring before such Courts any party or person, further or otherwise than such plaintiff is now by law, or the practice of such Courts respectively, required to do.

[b] Printed *ante*, p. 19.

ON THE STAMP DUTY ACTS.

No. X.

AGREEMENTS.—PROGRESSIVE DUTY.

Our previous remarks, on the Stamp Law of Agreements, distinctly shew how this law clashes with the true legal definition of the instrument; and the many notes of cases fully exemplify the harassing and perplexing effect of this duty. Our learned ancestors might well pause before they imposed a stamp duty on this description of instrument,—one which may truly be styled the universal document of society.

It was not however enough that the good order of society should be disturbed by a duty on the agreement substantially, but that a further and most oppressive inroad should be made thereon by a tax on the *quantum* of words used in expressing parties' intentions. We shall presently give the history and origin of this duty upon words, by which it will appear extraordinary how the legislature could ever have sanctioned so preposterous an enactment.

Let us here consider the mischievous effect of this duty upon words, commonly called "the Progressive Folio Duty." The statutes say, "And for every entire quantity of 1080 words contained therein, over and above the first 1080 words, a further progressive duty of, &c." It is also to be noticed that, in ascertaining the quantity of words, "every *schedule, receipt, or other matter* put or indorsed thereon or annexed thereto," must be included.

The operation of this enactment is, that all agreements written at the foot of printed particulars and conditions of sale by auction or otherwise, are charged with duty according to the number of words contained in, or, if the figures were expressed in words, would be contained in, such printed particulars and conditions of sale. The severity of this law was exemplified in the case of *Dudley and Ward* v. *Robins*, after quoted; the printed particulars and conditions comprehended a great number of words, and entailed upon the parties a great expense.

Confining our observations solely to agreements, this progressive folio duty is unjustifiable. In the case before us, a deed of conveyance would and must follow upon this agreement for purchase, and that deed of conveyance would not only pay a heavy *ad valorem* duty, but a progressive folio duty also: it is true the progressive duty on the deed would be 20*s*. per 1080 words, while that on the agreement is 25*s*. per 1080 words; yet it is actually obtaining 45*s*. per 1080 words, instead of 25*s*. or 20*s*.; or, in plain language, charging double duty on one and the same transaction; in fact, more than double duty, because auction duty is also generally paid upon the sale.

No one will be bold enough to deny that counting and numbering large quantities requires very close attention and care, and that the most accurate are occasionally inaccurate. If this difficulty in attaining strict accuracy ap-

plies to tangible bulky matters, how much more does it apply to words of written instruments. Yet the stamp law is such, that an error in computation of only 7 words in 2160, has, to my knowledge, been fatal, and operated to render an instrument inadmissible in evidence. The case of *Dudley and Ward* v. *Robins*, is a strong instance; much argument arose in that case, and it called forth the ability and skill of several adepts, in the counting of words of law instruments. Thus to expose parties to peril, almost beyond human means of escape, is tremendous; and when we find a heavy penalty enacted in case strict exactness should be wanting, it is enormous in the extreme.

The result is that, in most cases, an extra progressive folio duty is exacted from the cautious man, in order to avoid question hereafter. Our courts of justice have regulated the course of evidence as far as possible, by requiring counsel, who make an objection in this respect, to be prepared with a witness who can prove that he has counted the words and can positively state their number; but who is the man that, in conscience, can go beyond his belief?

We shall here quote a few cases on this point:—

In *Attwood* v. *Small*, 1 M. & R. 246, and 7 B. & C. 390,—the prior agreement (duly stamped) contained a clause for referring disputes to arbitration. A subsequent agreement between the same parties was also entered into (stamped with 20*s.* duty) which stipulated that disputes, as to the construction of the latter agreement, should be decided by arbitration, according to the provision of the prior agreement. Whereupon, it being contended that the number of words contained in the clause in the prior agreement should be taken as part of the subsequent agreement, which would have caused the number of words contained in that latter agreement to exceed 1080;—the Court held, that a stamp adapted to the number of words actually written in the latter agreement, without counting the clause referred to, was sufficient, *i. e.* the 20*s.* stamp with which it was impressed.

In *Windler* v. *Fearon*, 7 D. & R. 158, and 4 B. & C. 663, it was held, that the indorsement of the names of the parties, the date, &c. was no part of the instrument itself, and therefore not to be taken into calculation with reference to the progressive stamp duty.

In *Bowring* v. *Stevens*, 2 Car. & P. 337, it was objected, that an agreement stamped with 20*s.* duty was inadmissible in evidence, because, including the Stamp Office receipt for the penalty, it contained 13 words more than 1080 words. But *Abbott*, C. J., said, the Stamp Office receipt, for the penalty written upon the agreement, was no part of the agreement, and could not be included in the calculation of words with a view to the progressive duty.

Dudley and Ward v. *Robins*, 3 Car. & P. 26. This was an action in *assumpsit*, to recover back a deposit made on the purchase of an estate. The written agreement was put in; it was written on the back of a printed particular of sale, which contained also the conditions of sale, and was impressed with a 35*s.* and two 25*s.* stamps, as containing thrice 1080 words: but it was contended that the agreement contained more than four times that number of words, and therefore required another 25*s.* stamp. A witness proved he had counted the counterpart, and that it contained more than four times 1080 words. It was objected, that counting the counterpart did not prove how many words the original contained; whereupon, Lord *Tenterden* said he should wait till the officer of the court had counted the words in the original agreement, and directed *figures to be counted as words*.

Scarlett, A. G.—I submit that the first page of the particular of sale, which is a mere title-page, and also that the indorsement, ought not to be counted.

Lord *Tenterden*, C. J.—I must take either the first page or the third, as without one of them, there is no mention of the manor. I shall direct Mr. Bellamy to count the words, omitting the third page and the indorsement.

Scarlett, A. G.—If your Lordship will call another cause, we can send to the Stamp Office and get it properly stamped. This objection is a great hardship on the plaintiff, as the paper has had the present stamps put on it at the Stamp Office upon payment of the penalty.

Lord *Tenterden*, C. J., remembered Lord *Kenyon* doing so once.

Campbell.—My Lord, that was a solitary instance one way, against a *thousand instances* the other.

Lord *Tenterden*, C. J.—I must not allow this paper to be stamped, by stopping the cause,—it is too dangerous a precedent.

The plaintiff's counsel did not insist on the words being counted by the officer of the court, and the plaintiff was nonsuited.

In the ensuing term the Court granted a new trial, it appearing by the affidavits of three witnesses that the person called at the trial had miscounted the number of words.

We might have here closed this part of our subject, *the progressive duty*, had we not found on record the necessity and occasion for imposing and enforcing such duty, to have originated through a splenetic accusation of malpractice on the part of the members of the legal profession. It is well known that, from time immemorial, a skin of writing, in legal phrase, means 1080 words; for the legal fee or charge is regulated accordingly. The reason was, that deeds and writings, especially those relating to landed property, should be written very distinct, and in large and strong writing, so as to be easily read, and endure for ages to come: 1080 words were and have been therefore deemed as many as could or ought properly to be put upon one skin of parchment.

About the year 1779, some differences took place between a practitioner of the law and his client, which first gave rise to the idea of a

progressive folio duty, by producing the following enactments:—

19 G. 3. c. 66, recites, That by the laws in force all deeds, instruments, and writings charged with stamp duty, were to be ingrossed or written in such manner as they had been usually accustomed to be written. That therefore it was the general practice to insert in one skin of parchment 12 Chancery sheets containing 90 words in each sheet, or 15 Common Law sheets containing 72 words in each sheet, and the same had been held a fair and reasonable quantity to be ingrossed and written in and upon each skin of parchment; and that the usual charge for drawing and ingrossing the same might, upon any costs to be taxed, be fairly and equitably allowed. "And whereas several persons, *in injury to his Majesty's revenue of stamps*, insert in one skin of parchment the contents of a greater quantity of sheets than the quantity of Chancery or Common Law sheets above specified, and *charge their clients or employers double or treble* the sum for drawing and ingrossing such skins, calling the same double and treble skins, and *pretending that they insert* twice or three times as much in quantity as they are obliged to do; and that upon a taxation they would be allowed as much as they have charged, reckoning the same by the number of sheets, by which means the *client* or employer, instead of judging of such charge by the number of skins, is *liable to be imposed upon*, and the revenue of stamps materially injured and diminished; Be it therefore further enacted, That all *attornies, solicitors, or other persons*, shall make their several charges at and after the known and usual rates upon their client or employer, by the number of skins they shall so ingross or write, and not otherwise: and that if any attorney, solicitor, or other person shall, for the writing or ingrossing one skin of parchment only, charge any client or employer for double or treble skins, or for more than one skin, making his charge by the sheet, or in any other manner than by the skin, under pretence of having inserted in such one skin of parchment a greater number of sheets than what they are obliged to do, or than what is usually done, or under any pretence whatsoever, *such charge shall not be payable by the client*," &c. Then follows a proviso, "That the act shall not extend or be construed to extend to the charge to be made for the ingrossing any deed the whole contents of which shall not amount to the quantity or number of sheets to be contained in two skins."

Upon this notable act, followed the 37 G. 3. c. 19; which, after reciting the act just stated, and that its provisions had not been found effectual, and that other provisions should be made for more effectually securing the stamp duties, enacts the present scheme of progressive folio duty. And next, the 37 G. 3. c. 90, enacts, that if any attorney, solicitor, clerk, officer, or other person, shall ingross, &c. any *agreement*, &c. not duly stamped, and shall neglect to bring the same to be duly stamped within the time allowed for stamping the same; every such attorney, solicitor, clerk, officer, or other person, shall forfeit 20*l*.

Now observe, in 1779 there is much compassion evinced for the client, and means adopted for protecting him from the supposed tricks of the lawyer; but, forsooth, in the year 1797, the only compassion left was "for the revenue." Perhaps, from thence to the present day, the client and his lawyer have apparently been so much of a kin, that it was considered right to place them both without the pale; not omitting, however, to put a chain on the neck of the lawyer, by imposing a penalty on him individually, if he attempted any further to indulge his client's pertinacity.

J. A. H.

[*To be continued.*]

DISSERTATIONS ON CONVEYANCING.

No. IV.

ON THE LIABILITY OF AN HEIR AT LAW TO ELECT.

(*Concluded from page* 91.)

The authorities are thus brought down to *Churchman* v. *Ireland*, the facts of which appear to be, that the testator gave "all and singular *my estate* and effects whatsoever and wheresoever, and of what nature or kind soever, *both real* and personal, which I shall die *possessed* of, interested in, or entitled unto," to trustees, their heirs, executors, and administrators, upon trust, to apply a portion of the rents and dividends to the support of his son John, (who was his heir) and subject to other payments, upon trust, to invest the residue of such rents, &c. and after the death of his son, to sell and dispose of all his then real and personal estate. The testator having, after the date of his will, purchased lands,—the question was, whether the heir ought to elect between them and the provision made for him by the will; and the Vice-Chancellor having decided that he ought, the question came before Lord *Brougham*.

Without entering upon a minute and critical investigation of the words, further than to observe that the words "my estate," primarily imports the testator's interest in a property; and secondarily, the property itself; because it is impossible to have the interest without the property; and that the word "possessed," in the disposition of realty, is not of equal force with that of "seised," which was used in the case of *Buckingham*. It is submitted, that this case was essentially different from that of *Thellusson* v. *Woodford*, the purchases not only having been actually completed, but as to the estates he acquired by descent, he became actually seised of them without any diminution of his personal estate; and it is submitted, on the authority of every case on the subject which is to be found in the books,

that had the testator, in *Thellusson* v. *Woodford; completed* the purchases in his lifetime, the clause, which is undoubtedly a special one, could, as to such, have had no application, and the paramount prescriptive title which the heir acquired immediately on such completion, would not have been defeated by it; and *Churchman* v. *Ireland*, so closely resembled *Back* v. *Kett*; and both were so similar to *Bunker* v. *Cooke*, and *Alleyn* v. *Alleyn*, that it ought to have been decided in the same way; but being, however, supposed to be warranted by *Thellusson* v. *Woodford*, it is submitted (although there appears to be scarcely a point of comparison in common between them) that the fact of the claim of the heir in *Thellusson* v. *Woodford* not being perfected, particularly distinguished that case from *Churchman* v. *Ireland*, notwithstanding the rule, that "equity regards a thing agreed upon as actually done." His Lordship appeared to consider himself bound to determine between *Back* v. *Kett*, which was decided by Sir *T. Plumer*, M. R., and *Thellusson* v. *Woodford*, decided by Lord *Erskine*, whose previous pursuits did not tend to qualify him for an Equity Judge, so as to render his judgments of very high authority. The doctrine of election was *formerly* considered to originate either in a *plurality of gifts*, or in inconsistent or alternative donations, neither of which occurred in *Churchman* v. *Ireland*. The heir, at the date of the will, from which time, upon principle, it speaks as to real estate, had *no previous* claim upon the testator in respect of the estates he afterwards purchased. Nor is a testator allowed to make a law for himself (the effect of which is to prejudice his heir) in contravention of the law of the land; Latch. 42; *i. e.*, if Lord *Eldon* may be allowed to know any thing of the principles upon which a Court of Equity acts, and which in and previous to his time had never been held to be *destructive* of the statute law; which, from the paramount jurisdiction of parliament, had invariably been respected in that Court. The old law held, that an act of parliament could not be taken away except by another, and not by inference. 1 Jones, 106. Innovation—reckless innovation, is the distinguishing characteristic of the present day: settled principles appear to be disregarded, and the *will* of the Chancellor substituted in their stead. And the remark of the learned observer upon the ancient statutes, "that in the report of cases determined soon after the revolution (1688), the Judges continually differed in opinion, because the law was not then fixed by a long course of rational decisions," may again become a renewed and just ground of complaint. How opposite this course to that pursued by Lord *Eldon*, who said, in 2 Swanst. 414, "that the doctrines of a Court of Equity ought to be as well settled, and made as uniform almost, as those of the Common Law, laying down fixed principles, but taking care, that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this Court are to be changed with every succeeding Judge. Nothing would inflict on me greater pain in quitting this place, than the recollection that I had done any thing to justify the reproach, that the equity of this Court varies like the Chancellor's foot." That Lord *Brougham* is not adopting this view of equity is clear. It would, however, be insulting the judgment of the profession, to enquire which course is the most beneficial to the public. *Churchman* v. *Ireland*, has no doubt laid the foundation for many suits which would otherwise never have been thought of.

C. S.

REMARKABLE TRIALS.

No. XI.

GESCHE MARGARETHE GOTTFRIED'S CASE.

(*Concluded from p.* 90.)

After Miltenberg's death, Gesche received an offer of marriage; but her thoughts being directed to Gottfried, she refused it. Her parents suspecting this to be the cause of her refusal, told her that her marriage with Gottfried should never take place with their consent. Gottfried loved her, but did not wish to marry a person with children. She now again consulted a fortune-teller, and received the same answer. Thus, although she had got quit of her husband, there still remained serious obstacles to her union with Gottfried; first, her father and mother, and then her children. She hoped also to get possession, by the death of her children, of a legacy of about 650 dollars left them by old Miltenberg.

In April 1815, her mother was rather unwell, and came to live in her house, when she (Gesche) happening to light upon the packet of arsenic, part of which she had saved and locked up, it immediately occurred to her to poison her mother. As her mother seemed likely to recover, she gave her the poison in her favourite beverage of lemonade; and while mixing it, she burst into loud laughter, so that she shuddered at herself; but it instantly occurred to her that God made her laugh, as a sign that her mother would soon be laughing in heaven. A witness afterwards said that she appeared happy at her mother's death.

Death now followed death with fearful rapidity. The very first day after her mother's burial, Gesche was sitting in a room with her second youngest child on her knee; the thought of poisoning it occurred to her, and without hesitating a moment, she administered to the child some arsenic on a piece of the cake which had been presented at the burial of its grandmother. This was on the 10th of May, and on the 18th, without the least remorse, she poisoned her eldest child. In the agony of death, it clasped its arms round the mother's neck, but Gesche remained unmoved. Two weeks afterwards, she poisoned her father. About ten weeks after these events, while her son was sitting on her knee, he asked her why God took away all her children? This pierced

her to the heart, and she immediately resolved that he also should die.

Thus in the short interval between May and September, she murdered both her parents and her children. But the death of so many in so short a space of time, naturally excited some suspicion, and to silence this, she was advised by her friends to have the body of the child opened. This she readily consented to, and the child was declared to have died of inflammation of the bowels.

In this manner, as she thought, was every obstacle to her marriage with Gottfried removed, but Gottfried himself did not show any particular desire to marry her, although he liked her company; and so the winter of 1815-16 passed free from murder. It was on a Saturday in May 1816, that her brother returned home a cripple and in rags, having lost the use of his feet in the Russian campaign. Here, then, might be another obstacle to her marriage; at all events, he must share her father's property with her. This was motive enough for his death. As already mentioned, he arrived on Saturday, or, as some say, on Friday, after a long absence; he was poisoned on Sunday, and, to avoid suspicion, she passed a great part of the time at his bedside. On every occasion, she had the precaution to employ a different physician. Seldom or never did any of them attend two of her patients.

Another obstacle, however, arose; Gottfried would not marry her. But this also she overcame, by the interest of some of his friends. His original refusal had hurt her, and she began to dislike him, and came to the resolution of poisoning him also. But she thought him rich, and therefore determined at all events first to marry him, in order to be made his heir, and then to execute her purpose. One Monday morning, she and Gottfried had resolved to make a pleasure party to a little distance out of town; and she seized this opportunity of poisoning him, that his sickness might appear the more unexpected. While he was on his death-bed, she sent for a priest to marry them, so that she might make sure of the property. Thus had she poisoned father, mother, brother, and children, in order to be put in possession of Gottfried, and at length we find him also in the list of her victims.

She seemed now to delight in murder, and the slightest cause was sufficient to decide upon the life or death of any of her relations. She was disappointed, however, as to Gottfried's riches, for, instead of wealth, he left her debt, and it required all her cunning to conceal her disappointment.

Now that she was alone, she occasionally felt severely the loss of her children; often when she thought of them, she shut herself up in her garret, and wept bitterly. She carefully avoided schools, and every place where children were to be met; and seemed to be particularly conscientious in paying off the debts of Gottfried. She loved money, not so much for its own sake, as because it afforded her the means of making a figure among her acquaintances, and so of gratifying her vanity.

Yet, in spite of all these murders, she was not unhappy. She became acquainted with H——— (the name is not given), and in his company forgot all her sins, and, in her own words, believed herself the happiest in the world. She rejoiced in her reputation, especially as, after the death of Gottfried, she again immediately received an offer of marriage, which she refused. She had one child by Gottfried, begotten before marriage. We find at this period another instance of her hypocrisy.—Some one requested from her the loan of sermons, which she delivered with the request that great care of them should be taken, as they were the only means by which she was able to sustain so many judgments. She never read any of them. Whenever she attempted to read the bible, she thought the perusal of it of no use, and immediately closed the book.

She was now often ill supplied with money, but always found means of borrowing; often obtaining it from one in order to pay another. After the death of Gottfried, she seems to have rested for some years from her murders, and during that time to have had little to occupy her mind except the care of preserving her reputation untainted. In 1822 she went to Stade, to spend a few weeks with some friends. Here, before she was aware, her money failed her. She was too proud to own it, and could get none from home; she knew no person from whom she might borrow, and had recourse to falsehood. She broke the key of her drawer in the lock, threw it away, and then raised an alarm that somebody had stolen her money out of the drawer. The drawer was forced open, and no money appeared, and nothing could be more obvious than that she had been robbed. Being obliged to take an oath before a magistrate that this was the case, she did not scruple to commit perjury; after which she got a supply of money from her friends.

From time to time she received offers of marriage, all of which she turned to good account, by extorting money from her admirers. She was reputed rich, and in this belief her admirers readily yielded to her requests.

One of them, named Zimmermann, was thus induced to advance her very considerable sums, which she repaid with a great shew of tenderness. She was betrothed to him, but he too was doomed to swell the list of her victims; after extracting all the booty in her power, she poisoned him by degrees, that she might have an opportunity of shewing her tenderness to him during his sickness, and thus lull suspicion. By his death she was free of the money due to him, which he had advanced on her word alone, without taking a legal obligation.

She now began to poison her acquaintances, without any visible motive:—a child came to congratulate her on her birth-day, and received a dose on a piece of biscuit: a friend called one forenoon, and also received a dose; and she tried the strength of her poison on another of her friends, on whose face it caused blotches to appear.

She gave a dose to one of her lodgers, that during his sickness, she might plunder his

pantry. Zimmermann had a cousin named Kleine, in Hanover, from whom she succeeded in borrowing 800 dollars, but he became impatient for re-payment, and she had only 300 to give him. In this predicament she set out for Hanover, with the intention of poisoning Kleine, thinking by his death to gain delay. She accomplished her end, and after his death affirmed that she had given him a double Louis d'or the day before he died; but the whole story was a falsehood. She committed also several other murders for purely selfish ends; but the soul sickens at reporting them.

She was now often in want of money, and therefore could not keep up a large establishment, so that she was obliged to sell her house to a person named Rumpff, at the same time reserving a room or two for herself. Rumpff was fond of her, and used to call her aunt, but he had not been more than eight weeks in the house when his wife died, and he himself fell into bad health. He could do nothing but run about searching the whole house, from the garret to the cellar, for the cause of his trouble.

It chanced that he kept a pig; and wishing to have it killed, he sent for a butcher for that purpose. The butcher, with the view of pleasing him, brought to his room a choice bit of the pork, of which Rumpff partook, putting the remainder into his pantry. On the morrow he went to cut a slice from it, but he was surprised to find it in a different position from that in which he had left it the day before, and he perceived also that it was covered with a white powder. This excited his suspicions; he had the substance examined, and detected poison. Gesche's motive for this crime was to endeavour to regain possession of her house. She was arrested on suspicion.

The work before us, from which these particulars have been derived, gives no account of the trial or execution, which, as we are informed, is reserved for a separate publication; but it mentions that, in prison, she was tormented by dreams, in which she saw her victims sitting in the churchyard beckoning to her; and she was often so much afraid, that, immediately on awaking, she could not remain longer in bed.

The following judgment was pronounced by the High Court of Bremen, on 17th September 1830:—

"The Court of Justice, in terms of the law, and after the inquiries have been conducted according to the decree of the 22d May last, find the widow of Michael Christopher Gottfried, Gesche Margarethe, formerly Timm, accused of poisoning, and of several other offences, to be guilty of the following crimes, as proven, besides several robberies, frauds, and perjuries, and attempted abortion of her offspring, viz.

"1. To have poisoned both her parents, her three children, her first and second husbands, her suitor Paul Thomas Zimmermann, Anne Lucie Meyerholtz, Johann Mosees, the wife of Johann Rumpff, otherwise Mentz, the wife of Frederic Schmidt otherwise Cornelius, and Frederic Kleine of Hanover; and also to have caused the death of Eliza, the daughter of the said Schmidt, by poison, although this is not proven to have been intentional.

"2. Several times to have given poison to the said Johann Rumpff, with the intention of killing him, and thereby causing to him a severe illness.

"3. To have given poison to several other individuals, without any proven intention, but which was more or less injurious to their health.

"The Court of Justice, therefore, according to the penal code, art. 130, and taking into consideration the milder principles of the present usages of the law, condemn the accused, the widow of Michael Christopher Gottfried, as her well merited punishment, and to serve as a warning to others, to death by the sword, and entrusts to the criminal court the execution and publication of the sentence, and also the adoption of all necessary measures: all the expenses caused by the inquiries, judgment, and punishment, to be paid from the funds which she leaves, so far as they shall be sufficient."

CHANCERY REFORM.—
MR. SPENCE'S BILLS.

OUR readers will have seen, by the newspapers, that we were correct in our information as to the bills about to be introduced relating to Chancery Reform[a]. Mr. Spence's measures, of which we have a full account, will be brought forward in the course of this Session, printed, and generally circulated. They are expressly intended to be examined in the profession, and all suggestions as to them will meet with attention.

With respect to the bill for abolishing the useless offices, officers, and fees attached to the Court of Chancery, we apprehend little doubt can be entertained. We have so repeatedly called attention to this subject, that it is useless to say more than that we fully approve of it.

The second bill, which has for its object the substitution of "citations" instead of pleadings, we think open to much more doubt. It is to be remembered, that a bill in equity is very well adapted for effecting the purposes of justice. It is unembarrassed by the technicalities of pleadings at common law. There are no forms of actions to perplex, or special demurrers to fear. It is to be considered as the mode of obtaining the necessary evidence in the cause; and although thus it is sometimes necessarily long, it ultimately saves much expense, time, and labour, by obtaining admissions of all the important facts at issue, or at

[a] See *antè*, p. 65.

all events greatly narrowing the necessity of after-evidence. The bill in equity may be capable of improvement; but we are by no means prepared to see it altogether abolished. As the proposed measure now stands, this "citation" is confined to suits for the administration of assets by creditors and legatees; but we understand that Mr. Spence is desirous of extending it to suits for specific performance, mortgage matters, and other ordinary suits. We would beg him to pause, and well consider what he is abandoning, before he lends his name to a plan of this sort. There are sufficient grievances to be remedied in Chancery, which can admit of no doubt. Let these first be attended to. It would be easy to prove that it is the long train of sinecurists which presses the suitor down. When the measure is brought forward in either House we shall return to the subject.

ON LOCAL COURTS FOR THE RECOVERY OF SMALL DEBTS.

We observe by the questions which have been recently circulated amongst the members of the profession by the common law commissioners, that the subject of Local Courts is about again to attract attention. We inserted a copy of the questions, in our last number. The answers to them are to be sent to Mr. Faulkner, the secretary to the commission, under cover to the Secretary of State for the Home Department. The whole subject should be carefully considered by those who intend to give their *opinions*; and so far as *facts* are stated, the evidence should be founded on personal experience, and not on hearsay, and the uncertain statement of others.

The questions are designed to collect the fullest information regarding all the existing Local Courts, and the causes of their having fallen into disuse. It will be observed also, that an enquiry is particularly directed as to the expediency of authorising the trial of issues from the Superior Courts by the sheriffs of cities and counties. This is probably suggested as a substitute for the attempt to establish any new Local Courts, against which there are so many weighty objections.

Even in case of a revival of the old Local Courts, and an extension of their powers, it seems intended that there should be an ample provision for appeals to the Superior Courts; and where security is given for the costs this ought to be freely allowed, for otherwise it is certain that the public will not be satisfied with the uncorrected decisions of the petty tribunals.

We shall take an early opportunity to enter fully on the consideration of this important subject.

SUPERIOR COURTS.

ROLLS COURT.

TENANT FOR LIFE.—WILL.—APPOINTMENT.—CHARGE OF DEBTS.—PERSONAL ESTATE.

A tenant for life, with a power of appointment, having paid off a mortgage made by a former owner, and the mortgage term having been assigned to a trustee for him, made by will, whereby he executed the appointment, and devised other lands to trustees for sale to pay off all his mortgages and incumbrances charged on any of his estates thereby devised; the surplus to be part of his personal estate.

Held, *that this charge did not extend to the debt on the appointed estates paid by him.* But also held, *that that debt which was so kept alive, was assets for the payment of the testator's debts.*

Held, *that where monies arising from the sale of lands are directed to be part of the testator's personal estate, they are applicable to the payment of debts.*

The manor and lands of Grindon having been subject to a mortgage term of two thousand years, to secure 30,000*l.* and interest, became the property of Lord Henniker, who paid off the whole, except a sum of 2000*l.*, which belonged to his son, Sir Brydges Trecothick Henniker, Baronet, and the sum of 6000*l.* due to Major Jacob Henniker. Lord Henniker, by his will, devised the manors and lands of Grindon to his son, Brydges Trecothick Henniker, for life, and after his death, unto all and every the child and children of that son who might be living at the time of his decease, in such shares and proportions, and for such estate and estates as his son should, by any deed or deeds, writing or writings, to be by him sealed and delivered in the presence of, and attested by three respectable witnesses, direct, limit, or appoint; and in default thereof, he gave and devised the same unto all and every the child or children of his said son, Brydges Trecothick Henniker, that should be living at the time of his decease, in equal shares. The testator declared that this devise should be taken, subject to the charges and incumbrances thereon, and that the personal estate should not be liable thereto. Lord Henniker died in April 1803, and thereupon Sir Brydges Trecothick Henniker became tenant for life in possession of the manor and estate of Grindon, but subject to the sums of 2000*l.* so due to himself, and

6000*l.* to Major Henniker, with a power of appointment, among such of his children as should be living at the time of his decease. Sir Brydges Trecothick Henniker paid Major Henniker his 6000*l.*, and by indenture bearing date the 15th of April, 1803, Major Henniker assigned that sum to John Minet Henniker, in trust for Sir Brydges Trecothick Henniker. The mortgage term of two thousand years having become vested in Abel Chapman, and Sir Brydges Trecothick Henniker having become tenant for life of the manor and lands, and entitled to the sums of 2000*l.* and 6000*l.*, was desirous that the mortgage term should be assigned to a trustee for him; and by indenture bearing date the 23d of December, 1803, the residue of the term of two thousand years was assigned to Michael Pepper, in trust for Sir Bridges Trecothick Henniker, subject to a redemption on payment of the several sums of 2000*l.* and 6000*l.*, with interest. Sir Bridges Trecothick Henniker having six children, he made his will in February 1816, and thereby gave to his wife, Lady Henniker, an annuity of 1000*l.* during her life, and charged it upon his Newton Hall estate; and in pursuance of the power given by his father's will, he appointed his estate in Grindon among his younger children, by name, two daughters and three sons, as tenants in common, and their respective heirs. The testator gave his Newton Hall estate and some other lands in Essex, to a trustee, to the use of his eldest son, in strict settlement; and after reciting that he had charged the Newton Hall estate with the payment of 6000*l.* by way of mortgage, the testator directed the same to be discharged out of his personal estate, or out of his freehold estate thereinafter directed to be sold, and he devised to Lady Henniker and his eldest son certain freehold and leasehold estates, called the Hoxton Mill estate, upon trust to sell the same, and stand possessed of the monies to arise by such sale, upon trust, in the first place, to pay off and discharge a sum of 6000*l.* charged by way of mortgage on his Newton Hall estate, and all interest due thereon; and, in the next place, to pay off and discharge all other mortgages and incumbrances, if any, charged on any other of the testator's estates thereby devised: And the testator thereby directed, that after full payment of such mortgage money and interest, the residue of such purchase money should fall into and go, and be considered and applied, as part of his personal estate: And after giving divers annuities, and specific and pecuniary legacies, the testator devised and bequeathed the residue of his real and personal estate and effects, subject as aforesaid, and also subject to the payment of his just debts, unto his wife, Lady Henniker, and his eldest son, Frederick Henniker, their heirs, executors, administrators, and assigns, upon trust to sell such parts thereof as should be saleable, and after payment of the expenses attending such sale, and testator's just debts and funeral and testamentary expenses, to stand possessed of and interested in the clear residue or surplus of such monies, in trust for all and every the children of the testator, in equal shares and proportions; and the testator appointed his wife, Lady Mary Henniker, and his son, Frederick Henniker, executrix and executor of his will. In June 1816, the testator made a codicil, whereby he revoked the annuity of 1000*l.* given to his wife charged on the Newton Hall estate, and in lieu thereof, bequeathed to her an annuity of 700*l.* only, charged on the same estate; and after reciting that his Newton Hall estate stood charged with the payment of 6000*l.* which he had borrowed by way of mortgage, and the directions he had given by his will for payment thereof out of his personal estate and by sale of certain freehold estates, the testator, in consideration of the annuity of 1000*l.* to his wife being reduced to the sum of 700*l.* per annum as aforesaid, by which his Newton Hall estate would be of more value to his son Frederick Henniker than when the same was devised to him by his will, directed, in order to make a better provision for his younger children, that in case the sum of 6,000*l.* should so remain a charge upon his Newton Hall estate at the time of his death, the same should be raised and paid out of his Newton Hall estate, agreeable to the deed of mortgage made thereon, and not out of his personal estate, or out of the sale of his other estates thereinbefore mentioned, and by his will directed to be sold as aforesaid; and he thereby further charged his Newton Hall estate with the payment of all and every other sum and sums of money that he had, or should or might thereafter raise upon the same, or that should be due thereon, or any part thereof, at the time of his death; and he thereby further directed that the money to arise by the sale of his freehold and leasehold estates so directed to be sold as aforesaid, should be divided amongst his younger children in equal shares and proportions, when and as they respectively should attain the age of twenty-one years, as to sons; or that age, or day or days of marriage, which should first happen, as to daughters.

Mr. *Tinney* and Mr. *Swanston*, for the plaintiff.—The mortgage term having been assigned to a trustee for Sir Brydges, the charge of 8000*l.* upon the estate, of which he was tenant for life, was thereby kept alive. Sir Brydges having six children, executed the power by will in favour of five of them only; but the power did not enable him to make an exclusive appointment, and a question of election will therefore arise. Looking at the will and codicil, and the several devises and provisions, these two questions arise:—First, Whether the testator intended that the 8000*l.* should continue a charge upon the manor and lands of Grindon? Secondly, Whether the Hoxton Mill estate and other lands, devised in trust for sale, are subject to the payment of his debts generally. A tenant for life, paying off a mortgage, is understood to do so for his own benefit; but the question is, whether, un-

der the terms of this will, the testator meant the 8000*l.* to continue and exist as a charge? Now the testator directed his mortgages and incumbrances charged on any of his estates devised by his will, to be paid off and discharged; but, it is true, there were other mortgages and incumbrances upon the devised estates, and the Court will therefore have to decide whether the direction, by the codicil, to pay off all mortgages and incumbrances, does not include the 8000*l.*, which, it will be observed, the testator had kept alive by having the mortgage term assigned. As to the second point, the testator, by his will, having given his general personal estate to his six children, and not amongst the five only, he, by his codicil, increased the provision for his younger children only.

Mr. *Pemberton*, for Lady Henniker, the executrix.—Whatever was the intention of the testator by his will, yet he could not discharge, as against his creditors, the mortgage that was kept alive. She has been obliged to borrow money to pay the debts. The Court will feel no difficulty in making a declaration, whatever it may otherwise decree, that the sum of 8000*l.* is still subject to the payment of debts. The testator had carefully kept alive the 8000*l.*, and there is nothing in the will or codicil that tends to shew he meant it should merge in the estate.

Master of the Rolls.—The testator meant the charges which he himself had created, not what he himself was entitled to receive. He directs the charges on his estate to be paid; but this estate, over which he had a power, was not his estate. I think this is clear; but the 8000*l.* will be a primary fund for the payment of debts. By the will the testator gives his Newton Hall estate to his eldest son, and then directs the other estate to be sold, and the proceeds to be applied in payment of a mortgage upon the Newton Hall estate and other mortgages and incumbrances charged on the estates thereby devised; the residue was to form part of his personal estate; so that the estate decreed to be sold would pay the mortgages and debts; for making it personal estate, makes it liable to his debts. Then by his codicil he reduces the annuity to Lady Henniker, thereby benefiting his eldest son, but leaving him to pay the mortgage on the Newton Hall estate. And he directed the produce of the estates which were to be sold to be divided amongst his five younger children. The testator only intended they should take each a fifth, instead of a sixth; he never intended to alter that part of the will by which he declared what should be personal estate; he did not mean by the codicil to throw the specialty debts upon the eldest son—the 300*l.* by which the annuity was reduced, was just the amount of the interest on the debt charged on the Newton Hall estate.

The usual accounts were directed to be taken, and inquiries to be made.—*Wythe* v. *Henniker*, 27th April, 1832. M. R.

COURT OF KING'S BENCH.

[Before the Four Judges.]

SETTLEMENT BY RENTING A TENEMENT.

The 1 *W.* 4. *c.* 18, *respecting settlements by renting tenements of the yearly rent of ten pounds, is prospective in the first section, and retrospective in the second.*

This case came before the Court upon a question which had arisen at the sessions, as to the meaning of the late act of 1 W. 4. c. 18, which was entitled "an act to explain and amend an act of the sixth year of his late Majesty King George the Fourth, as far as regards the Settlement of the Poor by the renting and occupation of tenements."

This act presents an unfortunate instance of the looseness with which modern acts of parliament are frequently drawn. Under the old law of settlement, by renting a tenement of the yearly *value* of 10*l.*, questions were constantly arising from the difficulty of ascertaining, with exactness, the value of the tenement occupied by the pauper;—a difficulty of which each party endeavoured to avail himself: one side collecting all the valuers he could, who would swear the property to be worth 10*l.* a year; the other bringing forward those who would prove it to be worth less than 10*l.* This occasioned a great expense, and was an evil which was long wished to be remedied by making the *rent* actually paid, the criterion of the *value;* and that rent for a year, to the amount of 10*l.*, should be paid, in order to gain a settlement; thereby doing away the evil complained of, without making any substantial alteration in the means of acquiring such settlements. For this purpose, the legislature first commenced its operations in 1819, by passing the 59 G. 3. c. 50, which enacted "that no person shall acquire a settlement by reason of his dwelling for forty days in any tenement rented by such person, unless such tenement shall consist of a house or building being a separate and distinct dwelling house or building, or of land, or of both, *bonâ fide* hired by such person at and for the sum of ten pounds a year, at the least, for the term of one whole year; nor unless such house or building shall be held, and such land occupied, *and the rent for the same actually paid for the term of one whole year at the least*, by the person hiring the same." This act was held to have in some degree a retrospective operation, inasmuch as no settlement could thereafter be gained by a residence for part of the forty days before the act passed, unless the provisions of this act had been complied with. *Rex* v. *Mary le bone*, 4 B. & A. 681. *Rex* v. *Brighton*, 1 D. & R. 313. This act, from the wrong collocation of the words in the last sentence, relative to the rent, had a more extensive operation than was probably intended; for unless the *whole rent* (however great the amount) was paid, no settlement was gained. And though the inconvenience resulting from the difficulty of proving the tenement to be of 10*l.* *value*, was equally felt in the case of settlements derived from the *payment of parochial*

rates for such a tenement, as in that of a settlement by *renting*, that act did not affect settlements of the former description. To remedy these inconveniences, the 6 G. 4. c. 57. repealed the 59 G. 3. and enacted, that "no person should acquire a settlement by reason of settling upon, renting, or paying parochial rates for, any tenement not being his own property, unless such tenement shall consist of a separate and distinct dwelling house or building, or of land, or of both, *bonâ fide* rented by such person, at and for the sum of ten pounds a year at the least, for the term of one whole year; nor unless such house or building, or land, shall be occupied under such yearly hiring, *and the rent for the same, to the amount of ten pounds, actually paid for the term of one whole year at the least.*" This act apparently answered only one of the purposes intended; for upon a question arising upon the latter branch of the sentence, whether it was necessary that the whole rent should be paid, though more than ten pounds, the Court held that it was; for though the clause as it stood in the 59 G. 3. was altered by the insertion of the words, "to the amount of ten pounds," yet the subsequent words, "for the term of one whole year," were held to override the whole sentence; and that the grammatical construction ought to prevail, there being nothing, either in the preamble or the act, to shew that the law was intended to be altered. *Rex* v. *Ramsgate*, 6 B. & C. 712. *Rex* v. *Ashley Hay*, 8 B. & C. 27; 2 M. & R. 21. S. C. The act of 1 W. 4. c. 18. was then passed, which, reciting that doubts had arisen with respect to the intention of the legislature, and that it was expedient that such doubt should be removed, enacted, "that from and after the passing of that act, no person shall acquire a settlement for or by reason of such yearly hiring of a dwelling house or building, or of land, or of both, as in the said act expressed, unless such house or building, or land, shall be actually occupied under such yearly hiring, in the same parish or township, by the person hiring the same, for the term of one whole year at the least; *and unless the rent for the same, to the amount of ten pounds at the least, shall be paid by the person hiring the same* (§ 1.): Provided, that where the yearly rent shall exceed ten pounds, payment to the amount of ten pounds shall be deemed sufficient for the purpose of gaining a settlement under the said recited act."

The circumstances of the case now before the Court were simply these: Before the commencement of this act (which is dated March 30th, 1831), a house had been occupied, in St. George's, Hanover Square, for a year, at the rent of 50*l.*, but only 20*l.* of the rent had been paid: it was contended at the sessions, that the act was prospective, and had no operation upon a by-gone settlement; and the sessions were of that opinion, and with difficulty granted a case for the opinion of this Court.

Scarlett and *Bodkin* now contended, that the words "shall acquire," evidently applied to future cases; and that the second clause, being in the shape of a proviso, was intended to narrow, and not to extend the previous clause. They also referred to the title of the act, which was to explain, and could only mean to apply to cases arising after the passing of the act.

Campbell and *Prendergast, contrà*. This is a very clear case. The statute is unskilfully drawn; and though it was passed to remove doubts, it has unfortunately had the effect of creating others. The first section is prospective, and the second retrospective. [*Parke*, J.—The proviso would be unnecessary, unless it is retrospective. *Campbell*.—Yes, my Lord; it has no effect]. No settlement would have been gained under the 6 G. 4.; but the 1 W. 4. was expressly passed to restrain that act.

The Court here stopped them, saying, that unless the second clause was retrospective, it would carry the matter no further than the first clause; and that the title of the act was not material, as it was merely to explain.

Order of Sessions granted.—*Rex* v. *Inhabitants of Dursley*. K. B., April 26th, 1832.

Without the assistance derived from the second section, it might be still doubtful, upon the correct construction of the first section, whether the whole rent ought not to be paid; for the words are, "that *the* rent for the same, to the amount of ten pounds at the least, shall be paid." What rent is necessary, is not specified in this act; but it refers to the 6 G. 4. c. 57. § 2: that section enacts, that the tenement shall be "rented at and for the sum of ten pounds a year at the least." The words "at the least," were intended to fix the minimum of the rent, and not the maximum. If the words had been, "*the* rent for the same shall be paid," without more, the obvious meaning would have been, that the whole rent should be paid. Then the words added, "to the amount of ten pounds at the least," exclude a rent to a less amount, but do not express that where the rent is more, payment of less than *the whole* rent would be sufficient to gain a settlement. The first section, though passed professedly *to explain*, does not explain the meaning of the 6 G. 4, but *re-enacts* what shall be necessary to gain a settlement. The second section does not carry the matter further; for though that expressly says, that where the rent exceeds ten pounds, payment to the amount of ten pounds shall be sufficient: yet it confines its own operation to settlements *under the recited act* (*i. e.* the 6 G. 4. c. 5. § 7).

In *Rex* v. *Ringsteud*, 7 B. & C. 607, the 6 G. 4. c. 5. § 2. was held to be so far retrospective, as to prevent a settlement being gained by payment of taxes, which had commenced, and had not been completed, when that act passed; for it was necessary, to gain a settlement by paying taxes, that the pauper should have resided on the tenement for forty days afterwards: and in the case then before the Court, all the forty days had not passed; and the Court held, that the forty days (though they had commenced before the act passed)

could not run on after the passing of the act; and consequently, by means of that act, the pauper was deprived of a settlement, either under the old act or the new one. However, in *Rex* v. *Ditchent*, 9 B. & C. 176, it was held, that a holding and occupation, before the 6 G. 4. c. 57, might be connected with a holding and occupation since, provided the previous holding, during the whole time, was such as to satisfy the provisions of the 6 G. 4. See 2 Dowling's Statutes, 30.

BANKRUPTCY COURT OF REVIEW.

SECOND COMMISSION.—PROOF OF DEBT.

Bills of exchange given by a bankrupt who had obtained his certificate, for a debt existing before the bankruptcy, may be enforced at law. A bankrupt not having paid fifteen shillings in the pound, under a second commission against him, a creditor who might have proved under that second commission, but did not do so, can prove under a third commission against the same bankrupt.

Any debt for which a creditor can sue at law, and against which a Court of Equity will not relieve, may be proved under a commission of bankrupt.

This was the petition of William Morley and James Morley, copartners, separate creditors of the bankrupt Leigh. On the 11th of September, 1823, a commission of bankrupt was issued against the bankrupt and another person, under which they were declared bankrupts. On the 19th of September, 1826, Thomas Sherlock, of Dublin, merchant, proved a debt of 700*l.* 18*s.* against the separate estate of Leigh, upon certain of his bills of exchange. The debt, in respect of which these bills were given, was contracted by the bankrupt, Leigh, in 1814; on the 16th of March, a dividend of 4*s.* 6*d.* in the pound was ordered to all the separate creditors of Leigh who had proved. On the 19th day of July, 1803, a commission was issued against Leigh. On the 17th day of August, 1811, another commission issued against him; another on the 15th of September, 1815; and another on the 28th day of October, 1820. Under all these four commissions the bankrupt, Leigh, obtained his certificate; but no dividend was ever paid to any of the creditors under any of these commissions of bankrupt.

The petition alleged, that the debt of Sherlock was barred by the statute of limitations, or by the certificates obtained by the bankrupt under the two commissions which issued against him in 1815 and 1820, and prayed that the debt might be expunged: it further appeared, that the bankrupt, Leigh, in 1819, had occasion to go to Ireland, where Sherlock threatened to proceed against him for the recovery of the debt, the certificate obtained in England not being a protection to the Irish creditors; Leigh thereupon gave to Sherlock three bills of exchange, payable one in one year, another in two years, and the third in three years. Sherlock did not prove any debt under the commission of 1820. In 1820 Leigh was a prisoner for debt in the King's Bench, and the first bill having then become due, Sherlock caused a detainer to be left with the warden for the sum of 160*l.* the amount of such bill. Leigh had not, at this time, obtained his certificate; but he did obtain it in 1821, and then, on a summons before a judge, it was ordered that the detainers against him should be discharged.

Mr. *Twiss* and Mr. *Keene*, for the petitioners.

Mr. *Swanston* and Mr. *Campbell*, for the respondents.

On the part of the petitioners it was argued, that it was incumbent upon Mr. Sherlock to have proved his demand under the commission of 1815, if he ever meant to prove at all, and that he ought not to be allowed to prejudice the subsequent creditors, by proving under the commission of 1823, the bills of exchange which he obtained in Ireland in 1819; and if these bills of exchange were good, they ought to have been proved under the commission in the year 1820, and that the assets of the bankrupt under the commission of 1823 having arisen from the credits given since 1820, Mr. Sherlock, whose demand, under any view of it, must have arisen before 1820, could not be permitted, in justice, to prove under the commission of 1823.

The Court held, that any debt for which a creditor could sue at law, and against which a Court of Equity would not relieve, might be proved under a commission of bankrupt. The bankrupt gave these securities in 1819, when he was not under duress—he was merely threatened with legal proceedings. By reason of the commission of 1820, and the certificate under it, the bankrupt could not be arrested for this debt, but he could be sued for it, and his goods could be taken in execution; because the commission of 1820 was not the first commission against him, and he did not pay under it 15*s.* in the pound. Upon the same principle the creditor might prove under the commission in 1823.

The petition must be dismissed with costs.—*Ex parte Morley, in re Govett and Leigh.* 9th June, 1832. B. C. R.

SITTINGS IN CHANCERY.

After Trinity Term, 1832.

Seals, Re-hearings, Appeals, and Petitions,

BEFORE THE LORD CHANCELLOR.

Thursday	June 28	The First Seal.	
Friday	29	}	Re-hearings & Appeals.
Saturday	30	}	
Monday	July 2	}	
Tuesday	3	}	
Wednesday	4	}	

Thursday	-	5	The SECOND SEAL.
Friday	-	6	Re-hearings & Appeals.
Saturday	-	7	
Monday	-	9	
Tuesday	-	10	
Wednesday	-	11	
Thursday	-	12	The THIRD SEAL.
Friday	-	13	Re-hearings & Appeals.
Saturday	-	14	
Monday	-	16	
Tuesday	-	17	
Wednesday	-	18	
Thursday	-	19	The FOURTH SEAL.
Friday	-	20	Re-hearings & Appeals.
Saturday	-	21	
Monday	-	23	
Tuesday	-	24	
Wednesday	-	26	
Thursday	-	26	The FIFTH SEAL.
Friday	-	27	Petitions.

The Court will not sit after the 10th of August, but the sittings may be terminated before.

Seals, Pleas, Demurrers, Exceptions, Further Directions, Causes, and Petitions,

BEFORE THE VICE CHANCELLOR.

Thursday	June	28	The FIRST SEAL.
Friday	-	29	Pleas, Demurrers, Exceptions, Further Directions, and Causes.
Saturday	-	30	
Monday	-	July 2	
Tuesday	-	3	
Wednesday	-	4	
Thursday	-	July 5	The SECOND SEAL.
Friday	-	6	Pleas, Demurrers, Exceptions, Further Directions, and Causes.
Saturday	-	7	
Monday	-	9	
Tuesday	-	10	
Wednesday	-	11	
Thursday	-	12	The THIRD SEAL.
Friday	-	13	Pleas, Demurrers, Exceptions, Further Directions, and Causes.
Saturday	-	14	
Monday	-	16	
Tuesday	-	17	
Wednesday	-	18	
Thursday	-	19	The FOURTH SEAL.
Friday	-	20	Pleas, Demurrers, Exceptions, Further Directions, and Causes.
Saturday	-	21	
Monday	-	23	
Tuesday	-	24	
Wednesday	-	25	
Thursday	-	26	The FIFTH SEAL.
Friday	-	27	Petitions.

The Vice Chancellor will sit to hear Motions on the 18th of June, and every subsequent day until the First Seal.

The Court will not sit after the 10th of August, but the Sittings may be terminated before.

NEW ORDER IN THE COMMON PLEAS.

EASTER TERM, 2 W. 4.

IT IS ORDERED, That from and after the end of this present Term, there shall be made out, both for Middlesex and London, separate and distinct Lists of Causes to be tried at the respective Sittings, one of such Lists to consist of Causes to be tried at the Sittings in Term, and the other of Causes to be tried at the Sittings after Term: And that no Cause shall be entered in the List of Causes to be tried in Term, which shall have been previously entered in the List of Causes to be tried at the Sittings after Term, without the consent of both parties, signified in writing.

N. C. TINDAL.

NOTES OF THE WEEK.

House of Lords.

CONTEMPTS IN ECCLESIASTICAL COURTS.—LUNATICS.—ANATOMY.

These Bills are still waiting for the second reading.

REMEDIES AGAINST THE HUNDRED.—PUNISHMENT OF DEATH.

Waiting for Committee.

SENTENCE OF DEATH.

Waiting for report.

CONTEMPTS IN EQUITY.

Waiting for the third reading.

House of Commons.

LIMITATION OF ACTIONS BILL.—FINES AND RECOVERIES.—CURTESY.—INNERITANCE.

Reported, and ordered to be read a third time.

DOWER.

Committee deferred.

BANKRUPT ACT AMENDMENT.

The report deferred.

WITNESSES IN EQUITY.—ARBITRATION.

Committee deferred.

STATUTE OF FRAUDS AMENDMENT.—ATTESTATION OF INSTRUMENTS.

Second reading deferred.

PRIVILEGES OF PARLIAMENT.

Committee deferred.

CORONERS' BILL.—BIRTHS' REGISTRATION.

Reports to be further considered on the 20th of June.

GENERAL REGISTER.

The second reading on the 20th of June.

CHANCERY REFORM.

Mr. Spence has given notice of a motion on the 10th July, for leave to bring in his Bill "to diminish the expense and delay of proceedings in the High Court of Chancery in certain cases."

USURY LAWS.

Second reading on Monday next.

FEES IN BANKRUPTCY.

A return has been ordered of the average amount of Messengers' Fees for two months during the first three months of the last three years, and those of the present year.

INNS OF COURT.

On Thursday Mr. Harvey brought forward his motion on this subject, which was lost. We shall return to it next week.

NEW RECORDER.

Mr. John Wood has been elected Recorder of York.

UNIFORMITY OF PROCESS BILL.

According to our promise, we had prepared a series of articles on the above statute, and one of them we purposed to insert in the present number; but having learnt, from the best authority, that the Judges were at present engaged in forming rules for the execution of the statute, according to the directions of the fourteenth section, we thought it preferable to defer our observations until the rules appeared. We shall thus be better able to make our remarks of use to our readers, as we shall have better *data* on which to proceed.

ANSWERS TO QUERIES.

LAW OF LANDLORD AND TENANT.

FIXTURES. P. 63, *ante*.

1. The opinion of Lord Kenyon, expressed in the case of *Dean* v. *Allaly*, (cited in Mr. Woodfall's Book, and in 2 Esp. 11), I apprehend completely sets this question at rest, as he there most distinctly states, "that the law will make the most favourable construction for the tenant, where he has made necessary and useful erections for the benefit *of his trade*, and which enable him to carry it on with more advantage. It has been so holden in the case of cider mills, and in other cases; and I shall not narrow the law, but hold erections of this sort to be removeable at the end of the term." In *Penton* v. *Robuck*, 2 E. R. 88, and in *Elves* v. *Mawe*, 3 T. R. 38, this doctrine is also clearly recognized.

R. B.

2. With respect to what shall be deemed fixtures, of such a nature or under such circumstances as they can, or cannot, be removed by an outgoing tenant, the law is much less strict at the present time than it used to be. The old and general rule of law was, that what was ever fixed to the freehold, became part of it, and could not be removed by the tenant; but of late years there have been numerous exceptions to this rule, 3 Atk. 16, n. 1. The first is between landlord and tenant, the latter of whom may now take away, during the term, all chimney pieces, and even wainscots, put up by himself, and all such other things as are necessary for trade, as brewing utensils, furnaces, coppers, fire-engines, cider-mills, &c. as he has himself put up or erected, 1 Atk. 477, 478. But such removal must be within the term, otherwise he will be deemed a trespasser.

I consider the steam engine as a fixture, and consequently the tenant has no power to remove it, after an express covenant, worded in the manner described by the queriest, not to do so.

H. B. A.

COMMON LAW.

DEVISE.—PERSONALTY. P. 48, *ante*.

I apprehend that the purchase-money of the estate contracted to be sold by *A. B.*, is to be considered as personal assets of the testator; at least, it is so far to be considered personal assets as to be liable to the probate and legacy duties. *Attorney-General* v. *Halford*, 1 Price, 426. The only difference between such a devise and that of personal property, would be in the constitution of the will;—the former would

require certain solemnities in its execution, which might be dispensed with in the latter.

J. J. S.

WILL AND CODICIL. P. 79, *ante.*

The will and codicil alluded to by H. B. A. ought, I apprehend, to be taken separately and distinctly, and not jointly, so as to validate each other, the codicil being in fact a supplement to the former; and the 29 Car. 2. strictly requires the attestation of three witnesses, in order to pass real estate, *both on the will and the codicil*; and as those contained in this question are destitute of this requisite, I conceive them both to be invalid.

R. B.

INTEREST. P. 80, *ante.*

In my opinion, *B.* is clearly entitled to sue *A.* for interest accumulated on his security, separately from the principal debt; for if by the terms of the contract the payment of the money borrowed was to be postponed till a distant period, and interest be reserved and made payable in the mean time, the lender could not (if my opinion is incorrect) have any means of enforcing the payment of the interest before the principal could be recovered. *Vide Dickenson* v. *Harrison*, 4 Price, 282, and *Herries* v. *Jamieson*, 5 T. R. 553.

ATTORNEY.—LOST BILL. P. 64, *antè.*

I beg to refer O. to the case of *Hansard* v. *Robinson*, 7 B & C. 90; in which it was decided that the holder of a bill of exchange cannot compel payment by the acceptor, without producing and offering to deliver up the same; and that in case of a bill of exchange being lost, the indorsee cannot recover upon offering a bond of indemnity to the acceptor.

W. L. H.

NEW RULES.—INDORSEMENT OF COSTS. P. 16 and 62, *antè.*

I beg leave to differ from your correspondent R. M., when he asserts that only one party can be sued upon a bill of exchange, unless at the risk of losing the costs against the others. The words of the order are, certainly, rather doubtful; but they do not, I think, go the length of preventing the holder from suing, as heretofore, all the parties on the bill. If the drawer, upon being served with process, pay the debt and costs, according to the indorsement on the writ, proceedings must, of course, he being no further liable, be stayed against him. It is, however, the practice of many offices, when proceedings are taken against drawer and acceptor, to make the memorandum on the writ issued against the latter in something like the following terms:—

"The plaintiff claims —*l.* for debt, and —*l.* for costs; and if the amount thereof, together with —*l.*, being the costs of a writ issued against the drawer of the bill of exchange, on which this action is brought, be paid to the plaintiff or his attorney within four days from the service hereof, further proceedings will be stayed."

X.

STATUTE OF LIMITATIONS.—DEATH. VOL. III. P. 236 and 283.

It seems to me that H. B. A. and Z are wrong in supposing that in an action brought by an administrator for a debt accruing in the lifetime of the intestate, the statute of limitations would only run from the time of granting the letters of administration. In the case cited by H. B. A. (*Murray* v. *East India Company*, 5 Barn. & Ald. 204), the action was brought against the acceptor of a bill of exchange, which was not accepted until after the death of intestate, consequently, until the letters of administration were granted there was no person capable of suing, and therefore the statute could not begin to run; but in the case supposed the intestate himself would be capable of suing at the time the debt was incurred, and the statute would therefore begin to run at that time, and the subsequent death or incapacity of the party would not prevent it from running out. The granting of the letters of administration would not give any new cause of action. See *Hickman* v. *Walker*, Willes, 27, cited in 1 Sel. N. P. 132. 3d edit.

S.

QUERIES.

PRACTICE.

RULE TO PLEAD BEFORE NOTICE OF DECLARATION.

It is a matter of doubt with some of our first practitioners, whether a rule to plead, given before the service of notice of declaration, is not irregular; and whether the proceedings may not be set aside upon that ground. I find the two assistant masters of the Court of King's Bench, differ in their opinions upon it. Perhaps some of your readers can settle this doubtful point.

W. W. C.

COMMON LAW.

STATUTE OF LIMITATIONS.

A. died in 1814, being indebted to *B.*, his son, in a large sum of money, which had been owing upwards of seven years. *A.* was considered to be insolvent at the time of his death, and his will was not then proved; but it has been recently discovered that he was entitled to some property, which *B.*, having proved the will, has recovered as his representative, and is in possession of. The residuary legatees under *A.'s* will claim the whole of the property, contending that *B.* cannot retain the amount of his debt, because it is barred by the Statute of Limitations. Can the claim of the legatees be supported? See *Spears* v. *Hartly*, 3 Esp. 81.

INQUIRER.

CURATE.—CHURCHWARDEN.

Can an unlicensed curate appoint a churchwarden in the absence of the rector? *Vide* Burn's Ecclesiastical Law. R. F. L.

PARTNERSHIP.—BANKRUPTCY.

A debt contracted by *A.* with *B.* previous to his (*B.*'s) entering into partnership with *C.* Can *A.* make *B.* and *C.* bankrupts? and, presuming that they are made bankrupts by any other individual, will *A.* be allowed to prove his debt under the joint commission of *B.* and *C.*, for the purpose of obtaining a dividend from the proceeds of the partnership assets? It will be observed, that the debt is contracted with *B.* alone, and a warrant of attorney given for the amount, payable by quarterly instalments, of which two have been paid; the payments have been made subsequent to the partnership. H. D.

LAW OF PROPERTY AND CONVEYANCING.

LEGACY.

A., by will, charged a leasehold estate with the payment of two annuities; one to the use of infant children, and the other to a married woman independent of her husband. The executor has paid the annuities for one year, the one to the father of the children, on his receipt, and the other to the husband, on the wife's receipt, for her use. The estate is now found to be insolvent, and the executor demands a return of the annuities so paid to the father and the husband, and threatens to commence legal proceedings to recover the same. Can such actions be supported, and on what principle? INQUIRER.

DOWER.

Wife Dowable.—Husband, by will, charges his real estate with an annuity of 400*l.* to his wife for life. Is the wife bound to elect? See *Foster* v. *Cooke*, 3 B. C. C. 347. INQUIRER.

LOST DEEDS.

The title deeds of an estate, which has been mortgaged to a considerable amount, having been *lost* by the mortgagee, what remedy has the mortgagor against him; and what line of conduct is it prudent he should adopt under these circumstances? *The securities are not lost.* ASPIRO.

HUSBAND AND WIFE.—MARRIAGE ARTICLES.

A. B., by marriage articles, covenants to leave his wife a sum of money; in which articles he also declares, that nothing therein contained should debar her of what he intended to give her by will. He afterwards gave and bequeathed unto her, by will, a considerable sum of money. Must she not either waive the articles or the will? H. B. A.

WILL.—ALTERATIONS.

A. made a will, and shortly afterwards obliterated and considerably altered it, but left entire a part relating to a copyhold estate, and sent it to be engrossed, but died before it was finished. Will the copyhold pass, or does it descend to the customary heir? H. B. A.

BEQUEST.—MAINTENANCE.

A. B. gave and bequeathed, by his will, the sum of 4000*l.* to his executors, one of whom was the testator's son, in trust to divide the same between his grandchildren, on their attaining their age of twenty-one years. Can the testator's son support any claim to any part of the property, on account of money laid out and expended by him in the education and maintenance of his children during their minority? H. B. A.

MISCELLANEA.

SIR WILLIAM JONES ON THE STUDY OF THE LAW.

There is no branch of learning, from which a student of the law may receive a more rational pleasure, or which seems more likely to prevent his being disgusted with the dry elements of a very complicated science, than the history of the rules and ordinances by which nations, eminent for wisdom, and illustrious in acts, have regulated their civil polity; nor is this the only fruit that he may expect to reap from a general knowledge of foreign laws, both ancient and modern; for whilst he indulges the liberal curiosity of a scholar in examining the customs and institutions of men, whose works have yielded him the highest delight, and whose actions have raised his admiration, he will feel the satisfaction of a patriot, in observing the preference due in most instances to the laws of his own country above those of all other states; or, if his just prospects in life give him hopes of becoming a legislator, he may collect many useful hints, for the improvement even of that fabric, which his ancestors have erected with infinite exertions of virtue and genius, but which, like all human systems, will ever advance nearer to perfection, and ever fall short of it.—*Preface to the Speeches of Isæus.*

The Legal Observer.

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——— "Quod magis ad NOS
Pertinet, et nescire malum est, agitamus."
HORAT.

SKETCHES OF THE BAR.

No. V.

SOME ACCOUNT OF THE LIFE AND WRITINGS OF CHARLES BUTLER, ESQ.

WE have now to redeem our pledge, of giving some account of the life and writings of Mr. Butler,—a task which we are sure will be as interesting to our readers as to ourselves. His name and reputation have not been confined to the limits of the profession. He is well known to the public as the author of many able polemical and biographical works; but we have only to consider him as a lawyer.

Mr. Butler was born at the house of his father, in Pall Mall, on the 15th of August, 1750. He was the only son of Mr. James Butler, who carried on the trade of a linen-draper. His uncle was the Reverend Alban Butler, the author of several works. He shewed at a very early age more than ordinary talents. He was bred up in the Roman Catholic religion, and after some preparatory studies at a school at Hammersmith, he was sent to the Roman Catholic College at Douay, where he was much distinguished, and where he acquired that extensive knowledge of the labours of the Roman and foreign jurists that subsequently occupied so many of his leisure hours. He returned to England, and was entered at Lincoln's Inn, in the year 1775.

Soon afterwards he became the pupil of Mr. Holliday, well known as a conveyancer of that day. Here, it is said, he met Lord Eldon, who was a contemporary of his; although this circumstance can hardly be reconciled with Lord Eldon's own statement, of his having been[a] a pupil for two years with Mr. Duane. However this may have been, it is certain that Lord Eldon and Mr. Butler were very early friends; and it will be seen that the former eminent person did not forget his early acquaintance when he had an opportunity of serving him.

When Mr. Butler quitted the chambers of Mr. Holliday, the legal prospect for one holding his religious opinions was sufficiently bounded. A Roman Catholic could not be called to the bar, or hold any official situation whatever. Under the circumstances, Mr. Butler selected that branch of the law which he considered as most suited to his taste and the exercise of his abilities, and commenced practice under the bar as a conveyancer,—which part of the profession was then becoming particularly celebrated, and counted amongst its members the eminent names of Fearne, Booth, Duane, Shadwell, and others nearly as celebrated.

He soon obtained a very considerable practice, and acquired the esteem and respect of his profession: indeed his mild and conciliatory manners, his varied information, and extensive knowledge, could not fail to make his acquaintance and friendship much sought for.

By the 31 G. 3. c. 32, an act passed for the relief of the Catholics, a clause was inserted, § 6, as it is understood, by the instrumentality of Lord Eldon, then Solicitor-General, for dispensing with the necessity of a barrister taking the oath of supremacy, or the declaration against transubstantiation, and the substitution of a declaration

[a] *Marquis of Townshend* v. *Bishop of Norwich*, Jan. 27, 1820. cit. Sug. V. and P.

instead. Soon after the passing of this act, Mr. Butler availed himself of its provisions, and in the year in which it was passed he was called to the bar; being the first Catholic barrister since the revolution in 1688. He took this degree, however, rather for the sake of the rank, than with any intention of going into Court; and we believe that he never argued any case at the bar, except the celebrated case of *Cholmondely* v. *Clinton*, before Sir Thomas Plumer and the House of Lords; and his argument is reported at great length in the reports of Mr. Merivale and Messrs. Jacob and Walker, and the other reporters of that case. He had for a long period enjoyed a very large practice as a conveyancer; and his ability as a draftsman and chamber-counsel are too well known to render it necessary here to dwell upon them. Early in the present year, the Lord Chancellor informed him, that if he chose to accept a silk gown, he was desirous of giving it to him; and he was accordingly called within the bar, and made a bencher of Lincoln's Inn. He took this honour, however, without any view to practise, and has, we believe, never appeared in Court except on the day on which he received his rank, when the Lord Chancellor departed from the common rule, and complimented him on his advancement. This honour was thrown open to him by the Catholic Relief Act. We have now stated the particular circumstances relating to his life. It remains for us to mention his writings.

Mr. Butler first appeared in print in an anonymous Essay on Houses of Industry, a pamphlet intended to benefit the poor. His next, and by no means his least able work, was "An Essay on the Legality of Impressing Seamen." It was published in 1777, and met with very considerable success. It is written in support of the practice, and brings forward all the reasons which can be urged in its favour, besides proving most clearly that it is unquestionably legal, and warranted as well by ancient as by modern usage.

His next, and most celebrated work, was his Notes to Coke upon Littleton. In 1785, Mr. Hargrave relinquished his part of this undertaking, having annotated down to folio 190, being nearly one half of the work, which consists of 393 folios. The other half was undertaken by Mr. Butler, and published in 1787. The merits of this edition of Lord Coke's first Institute have been proved by numerous reprints; and Mr. Butler's notes have been universally considered the most valuable part of the work. They were the first attempts to render clear and simple the doctrines relating to real property; and they have in this an additional value, as having led the way for the other elementary and practical works which have lightened so considerably the labours of the student. They are as admirable in style as they are profound in information; and have the great and almost unequalled merit, of rendering some of the most abstruse learning plain and easy of comprehension. Their only fault is the form in which they are given, being necessarily unconnected and unarranged. Although much has since been written on the same subject, in them will still be found the best and clearest account of the doctrine of uses and trusts; and on many other points they contain the most valuable information. We could wish that they were now published in a separate form.

His next work, we believe, was written with the design of calling greater attention to Biblical literature, and to give the result of the author's researches on the subject. It is entitled *Horæ Biblicæ*, and was printed in 1797, and afterwards published.

In 1804, he published his *Horæ Juridicæ Subsecivæ*, consisting of an account of the geography, chronology, and literary history of the principal codes, and original documents of the Grecian, Roman, Feudal, and Common Law. He afterwards edited his favourite work, the celebrated Essay of Mr. Fearne. This performance, however, somewhat disappointed the profession. It was hoped that Mr. Butler would have added considerably in the way of annotation to the essay: he has, however, for the most part contented himself with dividing it, subdividing it, and giving summaries of the points laid down by Mr. Fearne.

In the years 1820 and 1827, he published two volumes of Reminiscences, which excited much interest, and obtained considerable success; and besides all these works, he is the author of many other biographical and historical publications, besides having maintained an active controversy with Dr. Southey, and the present Bishops of London and Exeter.

His last work, we believe, was a Memoir of Chancellor d'Aguesseau, and of his ordinances for consolidating and amending certain portions of the French Law. It was published in 1830, and contains, besides the Life of the French Chancellor, a reprint of his *Horæ Juridicæ*. He had always been an admirer of d'Aguesseau, as the readers of his works will remember; and it must

have been a solace to his old age to trace the history of his life. In the latter part of it, he takes an opportunity to glance at the state of law-reform in our own country, and praises the labours of Sir Robert Peel, the Law Commissioners, Mr Humphreys, and Mr. Sugden. He states the arguments briefly for and against a code, and seems rather to lean in favour of a sort of codification. Thus he proposes that a code of the law of Contingent Remainders and Executory Devises should be made, by enacting that all the principles in Mr. Fearne's celebrated book on these subjects, should be declared to be law. He deplores, almost passionately, the numerous points in which the law of England is open to doubt; and says, that "the cases of *Doe* v. *Hilder*, and *Doe* v. *Burdett*, have thrown the law on outstanding estates and interests into an uncertainty that cries to Heaven:"—an expression, which shews how the soul of a conveyancer can be moved by the attack of his favourite doctrines.

Mr. Butler's habits of life were remarkably temperate and regular; he attributes his learned works chiefly to this circumstance. "Very early rising;" he says in his Reminiscences, "a systematic division of his time; abstinence from all company, and from all diversions not likely to amuse him highly; from reading, writing, or even thinking on modern politics; and above all, never permitting a bit or scrap of time to be unemployed, have supplied him with an abundance of literary hours." In another place he says, "however fond he might have been of miscellaneous literature, he never allowed it to interfere with his professional pursuits:" he says, that it cannot be said of him as of M. Tessier, that "he was so absorbed in his literary pursuits, that his wife was frequently obliged to drag him from his library to his bureau. To this necessity, the loved and revered person to whom the Reminiscent owes thirty-seven years of happiness, was never exposed."

Mr. Butler had a very fair knowledge of the Greek, Roman, and French languages, to the first of which he applied himself late in life; and his old age was also solaced by the somewhat tardy enjoyment of English literature. He preserved to the last the faculties of his mind; but his bodily health had of late much declined. His illness, a stricture, was however of short duration. He died at his house in Great Ormond Street, aged nearly 82. He married a lady of the name of Eyston, and has left two surviving daughters, the eldest married to Colonel Stoner, and the other to Mr. Lynch, the Chancery barrister. He died on the 2d instant, universally lamented and respected.

PRACTICAL POINTS OF GENERAL INTEREST.

No. XXVI.

PRIVILIGED COMMUNICATION.

It is a well known rule, that confidential communications between an attorney and client are not to be revealed at any period of time. *Wilson* v. *Rostall*, 4 T. R. 759, 760; *Stoman* v. *Herne*, 2 Esp. N. P. C. 693. The following case is of considerable importance in illustration of this rule:—

In an action of assumpsit by the payee against the maker of a promissory note, the defence was, that the note was obtained by fraud; and it was proposed to give in evidence, on the part of the defendant, a conversation of the plaintiff with an attorney whom he had consulted on the transaction. At the time of the transaction a dispute had arisen between the parties, but no legal proceedings were pending. The plaintiff, however, consulted the attorney, as his attorney, as to his rights, and put an agreement, one of the documents connected with the transaction, into his hands to get it stamped. The attorney so consulted was not the plaintiff's attorney in the cause.

F. Pollock, for the plaintiff, objected to the reception of the evidence. The proper rule is, that if the communication made has any connection with legal proceedings, it cannot be given in evidence. In this case it would come within even a stricter rule; for it clearly had reference to an action contemplated, if not actually commenced.

Sir *James Scarlett* and *R. V. Richards*, for the defendant.—Formerly any communication to a legal adviser, even to a conveyancer, was excluded; but the rule has since been narrowed. The case of *Williams* v. *Mundie*, R. & M. N. P. C. 34, confines the privilege to communications relating to a cause or suit existing; and that case has since been acted on in the Common Pleas (*Bread* v. *Pitt*, 1 M. & M. N. P. C. 233), and in a case in Ireland (cit. *ib.*). The rule so laid down is the most reasonable. Suppose a man employ an attorney about a cause to enforce some civil right, and that in the course of their intercourse he confesses some crime committed by him; it would be absurd to protect him against the consequences of such a confession. The present case is clearly within the rule laid down in *Williams* v. *Mundie*. No cause was depending at the time of the communication; the witness received no instructions as to any cause; he

finally, when the cause was commenced, was not the person employed to conduct it.

F. Pollock said, he had heard *Dallas*, C. J. express very warmly his opinion of the necessity of extending the privilege beyond communications made with reference to a cause. (See *Cromach* v. *Heathcote*, 2 Bro. & B. 4). The rule cannot depend, at all events, on the fact of the attorney to whom it is made being afterwards concerned in the cause, or not; if it did, he might decline to act as attorney for the express purpose of becoming a witness, and the client might thus be betrayed. As to the case put, of a party confessing a crime, the law is not as stated on the other side. If the conversation be in its nature professional, all that the client says must be taken to be, in his opinion, material to the question on which he consults his legal adviser; and if so, it is to be protected. There may be many cases in which it would be very expedient for him to disclose circumstances in his life very remotely, or not at all, connected with the matter then in dispute. The attorney is not to determine whether the communication is material or not; yet if the conversation is not absolutely excluded, the decision of that question must either rest with him, or the mischief must be done, and the evidence heard in order to enable the Court to judge whether it is admissible or not.

Lord *Tenterden*, C. J.—I think the rule stated in *Williams* v. *Mundie*, as cited in Phillips on Evidence, is narrower than that which I am likely to have laid down in this respect; I think I could not have said that it must relate to matters communicated strictly for the purpose of *bringing* an action, or to a cause actually existing. I certainly have been more inclined to restrict the privilege than many other judges; and I have been so, very much in consequence of a cause to which my attention was drawn at a very early period of my professional life (before I was at the bar), which was tried on the Midland circuit, and in which Serjeant *Adair* went specially as counsel. It was an action for bribery; and on its appearing that a witness who was called to prove conversations was the attorney of the party, the judge at once refused to allow the evidence to be gone into, and nonsuited the plaintiff. The nonsuit was set aside and a new trial had, on the ground that though the witness was the defendant's attorney, the communication had not been made to him in his professional character. *Bramwell* v. *Lucas*, 2 B. & C. 745, proceeded on the same principle; and accordingly an attorney there was held to be at liberty to give evidence of inquiries made of him by his client, as to a mere matter of fact, for that his professional character was not there concerned. Suppose a party to consult an attorney, whether or not he should bring or resist an action; I cannot doubt that such a communication would be privileged, though no suit be pending at the time. In the present case no suit was pending at the time; but after dispute had arisen, the plaintiff consulted his attorney on the subject, put documents into his hands, and steps were taken on them to render them effectual. I think that was a communication made to the attorney in his professional character, with respect to a matter then in dispute and controversy, although no cause was in existence with respect to it: and I think that such a communication is privileged.

The evidence was therefore rejected. *Clark* v. *Clark*, 2 Moo. & Mal. 3.

By this case it is decided that a communication will be protected, although made before any action is commenced.

NEW BILLS IN PARLIAMENT.

A BILL TO EXTEND THE PROVISIONS OF AN ACT OF THE SEVENTH AND EIGHTH YEARS OF THE REIGN OF HIS LATE MAJESTY KING GEORGE THE FOURTH, RELATIVE TO REMEDIES AGAINST THE HUNDRED.

WHEREAS it is expedient to extend the provisions of an act made and passed in the seventh and eighth years of the reign of his late Majesty King George the Fourth, intituled, "An Act for consolidating and amending the Laws in *England* relative to remedies against the Hundred," to threshing machines; Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That if any threshing machine, whether fixed or moveable, or any part thereof, shall be feloniously cut, broken, damaged, or destroyed by any persons riotously and tumultuously assembled together, then and in every such case the inhabitants of the hundred, wapentake, ward, or other district in the nature of a hundred, or by whatever name it shall be denominated, in which any such offence shall be committed, shall be liable to yield full compensation to the person or persons damnified by the offence, not only for the damage so done to any such machines as aforesaid, but also for any damage which may at the same time be done by any such offenders to any erection or fixture whatever in or about or belonging to any such machines.

And be it further enacted, that the several clauses, remedies, and provisions contained in the said recited act, shall extend and be construed to extend to such machines as are hereinbefore mentioned, as fully and effectually to all intents and purposes as if the same machines had been mentioned and particularized in the said recited act.

Provided always, and be it further enacted, That nothing in this act contained shall extend to *Scotland* or *Ireland*.

TABULAR VIEW OF ALL THE BILLS NOW BEFORE PARLIAMENT RELATING TO THE LAW.

We have from time to time given the substance of the several bills introduced into parliament for the alteration of the Law; and, according to their importance, have stated more or less of the details of such bills. A few of them have passed into statutes; but the majority—nearly twenty in number—are still before parliament; and it may be useful to the members of the profession, to see at one view, in the following Table, the general scope of these numerous legislative measures, and be enabled to compare the existing Law with the proposed alterations.

Existing Law.	Proposed Alteration.
STATUTE OF FRAUDS AMENDMENT.	
An agreement signed by an agent is binding.	The agreement to be signed at foot by the party, or by some person *lawfully authorized*.
It is not necessary to be subscribed.	No letters to be binding.
It may be collected from correspondence, &c.	
Part performance of an agreement avoids the statute.	No act whatever to be conclusive, unless the agreement be signed.
	Proviso for recovering damages for repairs, rents, &c.
No leases are valid unless by deed, &c.	Leases may be granted for three years without an agreement in writing.
Wills to pass real property, must be executed and *attested* in the presence of three witnesses.	The attestation need not be subscribed in the testator's presence.
EXAMINATION OF WITNESSES IN EQUITY IN IRELAND.	
The Courts have no power to order the examination without the consent of all parties.	The Lord Chancellor to appoint standing commissioners to examine witnesses in Ireland in suits pending in England.
	The office held during pleasure.
	The like power given to the Court of Exchequer.
	Powers given to the commissioners to enforce the attendance of witnesses, &c.

Existing Law.	Proposed Alteration.
BANKRUPT ACT AMENDMENT BILL.	
The clauses authorizing the inrolment of depositions and proceedings, do not make the record evidence.	The depositions and proceedings entered of record to be receivable in evidence *in case of the death of the witness.*
	If the proceedings be lost, office copies of inrollment evidence.
	Provisoes as to commisions before the 6 Geo. 4.
USURY.	
All contracts for payment of interest limited to five per cent. in Great Britain and West Indies, and six in Ireland.	The former restrictions to be repealed, except as to loans on *land*.
	The interest not to accumulate beyond the amount of principal.
PRESCRIPTION.	
"Time immemorial," extending from Richard 1st.	*Rights of common* and other profits (except tithes) not to be defeated after thirty years, by shewing commencement.
	After sixty years the right to be absolute, unless exercised under consent.
	Rights of way.—Twenty years, conditional; sixty years, absolute.
	Use of light, twenty years, unless under consent.
PRESCRIPTION (TITHES).	
Time immemorial.	Thirty years, conditional; sixty years, absolute.
	Proviso restraining the act as to actions commenced within three years, and in cases of lease and composition.
ATTESTATION OF INSTRUMENTS.	
The mode of attestation varies, and is held to be insufficient unless in strict conformity to the power.	If executed according to the power, and attested by the number of witnesses required, it is to be deemed sufficient, though the attestation should not state a compliance with the terms of the power.

[*To be continued.*]

ON THE MISAPPLICATION OF THE REVENUES OF THE INNS OF COURT.

No. VII.

In my last article on this subject[a] (and I beg to assure my readers I have no intention of abandoning it until some result is obtained), I promised that when Mr. Harvey should have brought forward his motion on the regulation of the Inns of Court, again to advert to it. It will have been perceived, by those who have either heard or read the debate in the House of Commons on this motion, and have also done me the honour to observe the line of argument that I have taken, that Mr. Harvey's object differs considerably from mine. His complaint, stated and argued by him with great force and clearness, is this:—The bar is at present a monopoly; a proper person may be refused admission to any of the Inns of Court, either as a student or barrister, by their respective Benchers, and there is no remedy: no reason need be given; motives of the merest caprice, jealousy, or worse feelings, may operate perpetually to exclude him from all chance of success in what ought to be a profession open to all. I think that this is undoubtedly a great public and professional grievance—for the existence of which no sufficient reasons were given by the Attorney-General, who undertook to defend the present system. It is worthy of note, that many of the Lawyers in the House voted with Mr. Harvey, and that Mr. Campbell (a Bencher) spoke in support of the motion.

It has been my object, however, to call attention to the present faulty mode of legal education for practice either under or at the bar; and to point out the means of obtaining the proper application of the revenues of the Inns of Court; and, in particular, to call the attention of the Commissioners of Public Charities to the subject, having, I think, proved[b] that the Inns of Court are within their jurisdiction.

It is evident, however, by Mr. Harvey's motion, that the question is gaining ground. It was lost only by a trifling majority, and the public feeling is decidedly for a change of system. I venture, then, respectfully to beg the Benchers of the Inns of Court to take the subject into their earnest consideration—to do away with the absurdities of the present system, and to introduce a rational course of legal education—to institute lectureships—to enforce examinations, and voluntarily to grant what must otherwise be speedily wrung from them.

A Cestui que Trust.

[a] Vol. III. p. 415.
[b] See 3 L. O. 334.

REVIEW.

A respectful Reply to the General Report made to his Majesty by the Commissioners appointed to enquire into the Practice and Jurisdiction of the* Ecclesiastical Courts *of England and Wales. By John Haworth, Proctor in Doctors' Commons, and one of the Deputy Registrars of the Diocese of Lichfield and Coventry.

Our attention has been called to the subject of this pamphlet by some highly respectable subscribers; and we readily afford room for the principal statements of the author, which are certainly well deserving of attention: and we are the more induced to notice the work, as it has been printed for private circulation only, and cannot therefore be generally obtained by our readers.

Mr. Haworth appears to be a candid disputant. He admits, for the most part, the soundness of the Commissioners' opinions, and the propriety of their recommendations. The main point for which he contends, in opposition to the report, is the continuance of the *Diocesan Courts*, so far as relates to the granting of probates and administrations in *common form;* in other words, he wishes to preserve the testamentary jurisdiction to those courts. He is willing that the practice which applies to *conducting suits*, or what is termed "contentious jurisdiction," should be removed to the Superior Courts. He is also willing that Courts Peculiar should be entirely abolished.

On the branch of practice termed "common form," he gives the following account of the course which is pursued in the Diocese of Lichfield and Coventry, to which he belongs:—

"Parties applying for probates of wills or grants of administration, are sworn either at Lichfield before the Chancellor or his principal Surrogate; or if they cannot attend they may be sworn by commission. This commission is directed to the beneficed clergymen, or licensed stipendiary curates, who are well known to the Registry, and who are resident immediately in the neighbourhood of the parties to be sworn. This is a security for the due execution of the commission, which all the care of the late orders in Doctors' Commons cannot obtain.

"There is, however, another part of the practice of this court, relating to the swearing parties, which is of no small importance, both as respects their convenience, the saving of expense, and the immediate benefit of the revenue. It appears by the records, that, for upwards of three centuries, a custom has prevailed, for the several members of the court to traverse the diocese twice in every year—holding courts in some of the principal towns within it, most eligible for the purpose, and thus giving all the parties the opportunity of attending and transacting any business they may have to do, without the intervention of solicitors, without the expense of a commission, and without their attendance at Lichfield. These courts of probate consist of the Chancellor or his principal Surrogate—the Deputy Registrars, and the Proctors. The expense of these circuits is defrayed by the several members, and no additional charge is made to the parties to remunerate the practitioner for such expenses. Due notice is given in the several parishes by the Apparitor, of the days of holding these courts, and as he proceeds through the diocese he gives personal notice to the executors or relatives of deceased persons to attend and take out probate of the will or letters of administration of their effects. Such parties are also directed to bring an inventory of the whole of the deceased's personal estate.

"Independently of the convenience and saving afforded to the several parties by this practice, the great importance to be derived from it is to be found in the certain and direct knowledge of the law thus conveyed to them, which compels parties, who would otherwise wilfully avoid, or ignorantly neglect, to take out probate of the will, or letters of administration, to the property of a deceased person, after they have possessed themselves of or intermeddled in it. The law and the penalties are clearly explained in the notices, and there is no doubt that, by such a practice, the revenue is considerably benefited, not only by the probate, but also by the legacy duty.

"Now, may it not be asked, is not this practice of some importance, both as respects the convenience and saving of expense to parties, and the immediate benefit to the revenue? Can such a practice exist in the event of a removal of the testamentary jurisdiction to the Archiepiscopal Court? Will not the wilfully fraudulent become more secure from detection, and will not the ignorant have additional grounds of excuse for his neglect? The reply which the writer's experience in this diocese justifies, is, that an immense number of wills would never see the court of probate, and in an equal degree the intestate's property would never become the subject of administration."

Such is the reply which the author has offered to the recommendation of the Commissioners "of the transference of the *whole* of the testamentary jurisdiction, and the *exclusive* right of granting probates and administrations to the Archiepiscopal Courts of the respective provinces." He then proceeds to consider the reasons assigned in the report in support of the recommendation. They are, as to the Diocesan Courts, as follows:—

"The impracticability of having *judges* duly qualified, together with a competent *bar* and skilful *practitioners*, to administer the laws—and the insufficiency of the emoluments to maintain the efficiency of the courts[a]—the null and void grants that may be made in consequence of *bona notabilia* being discovered—and the expense and inconvenience attending the *assignment of terms* in consequence of so many courts of testamentary jurisdiction, causing frequently the necessity of extensive searches, and the taking of special grants for the purpose of assigning outstanding terms."

Mr. Haworth contends, that the abolition of the Peculiar Courts, which are very numerous, will reduce the trouble and expense of searches, so as to remove all reasonable grounds of complaint. With regard to the second reason—that of the discovery of *bona notabilia*—he argues as follows:—

"The law of *bona notabilia*, although of considerable antiquity, bears no comparison, in that respect, to the original institution of the Diocesan Courts. The very foundation of the law is, the assertion of the long pre-existence of diocesan and peculiar jurisdictions. The principal grounds of its institution, previous to the statute, were to extinguish the continual complaints, contests, and discussions between the ordinaries of the several jurisdictions, as to the rights claimed to be exercised by them in testamentary matters. The convenience of parties at such time was never a consideration. The amount of *bona notabilia* fixed in those days, *viz.* 5*l.*, was no doubt a fair sum with reference to the value of money, but the continuance of so small a sum up to the present time, when no comparison can scarcely be formed of the relative value of property, has thrown an immense portion of the diocesan practice into the Provincial Courts, which could not have happened, if the principle, upon which the amount of *bona notabilia* had been originally fixed, had been acted upon according to the increased wealth of the country and the altered value of money. Here, then, we see that the prerogative of the Archbishops originated out of the diocesan and peculiar jurisdictions, and that it has increased to its present extent by the continuance of the amount, fixed at the earliest period, for *bona notabilia*, to the injury and injustice of those courts from which it emanated. Surely, then, these are not rights which can justify an

[a] The removal of suits to the Superior Courts being an admitted improvement, we do not enter into the consideration of the reasons assigned by the Commissioners in its support.

absolute monopoly and the transference of the whole testamentary jurisdiction of the country to the prerogative of the Archbishops."

The writer further contends, that the difficulty of searches and obtaining grants for the assignment of outstanding terms may be effectually removed by the bill which was brought into Parliament to remedy this inconvenience, and prevent the necessity of taking grants for such purposes.

Mr. Haworth then proceeds to point out the local advantages of the Diocesan Court, in testamentary matters, to which he is attached, comprehending a population of nearly a million.

"In so large a body as that, which constitutes the main population of this diocese, it is seldom found that the property left by deceased parties is of any great amount, and consequently, it is a matter of some importance, that the expense of procuring probate, or letters of administration, should be as low as possible. The course pursued, as already stated, of giving them the opportunity of transacting business twice in every year within a short distance of their residences, enables them to obtain that object, and thus prevents the necessity and expense of applying to a solicitor, and a commission for swearing them.

"The facility which a Diocesan Registry affords for personal inspection of documents, or instituting inquiries as to property to which they may be entitled, or of which they may require information, is a convenience, with the class of persons above alluded to, absolutely necessary. The documents deposited therein can only apply to the property within the diocese, and although there must be persons resident in other parts of the country interested in them, yet the proportion of those without the diocese to those resident within, equally interested, must be trifling and few. To show more clearly and strongly the advantages and conveniences of this Diocesan Registry, the writer has extracted from the books of the Registry for the last four years, the number of applications for searches and copies and extracts of wills made by persons resident in London and its neighbourhood, and of those made by persons resident in the diocese, and the result is as under:—

	London Applications.		*Dioceses Applications.*	
	Searches.	Copies, Wills, and Extracts.	Searches.	Copies and Extracts.
1828	20	16	377	519
1829	27	24	387	451
1830	19	11	320	447
1831	22	24	246	499

"The above statement does not include the proportion of copies and searches in the Peculiar Courts, but from the limited nature of the property, as also from the residence of the parties most interested, an application out of the diocese is scarcely ever heard of; and no doubt can be entertained, that if those courts were incorporated with the Diocesan, the above disproportion would be considerably increased."

The author has also ascertained the comparative number of wills produced at the Assizes from the Diocesan Courts, and those produced in London, and the number, in the last four years, he states to be seven in London and forty at the Assizes; and he thence infers that the Local Courts are the more convenient places for registry.

It appears, therefore, that here is another occasion of the revival of the discussion on the fitness of *Local Courts*. It is remarkable, that while so many attempts have been made by Lord Althorp to amend or re-establish County Courts for the recovery of small debts, and by the present Lord Chancellor upon a broader scale, we should now be presented with a report recommending the abolition of all the Ecclesiastical Courts throughout the country except those of Canterbury and York, and intimating, moreover, that the latter might also be dispensed with. Thinking, as we do, that the establishment of Local Courts on the plan lately promulgated, would be most prejudicial, we should equally be inclined to oppose the creation of Ecclesiastical Courts of a local nature; but we admit that the total abolition of them is a very different question. The present writer seems to have taken the middle and safe course—namely, to concede the removal of all the petty or Peculiar Courts and the jurisdiction over suits, and to continue the testamentary jurisdiction of the Diocesan.

This course would meet another ground of objection contained in the pamphlet—namely, the interests of the present officers and practitioners—on which Mr. Haworth has written very ably. We fear, however, that neither Parliament nor the public will allow the doctrine of vested interests and the right to compensation to be extended to the general practitioner—not, perhaps, because there is no abstract justice in the claim; but on account of the impracticability of dealing with it, and either ascertaining or satisfying its amount.

OBJECTIONS TO THE COMPULSORY ARBITRATION BILL.

We inserted an Analysis of this Bill in Vol. I. p. 39, when it was first introduced to the House of Lords, in the month of

November, 1830. We subsequently inserted the remarks of a valuable correspondent (*ib.* 89) who approved of the measure, but suggested some improvements regarding the nomination of more than one arbitrator if the parties wished it, and of an umpire in case of difference. It was also recommended that the *parties* should be liable to be sworn and examined, and that the reference might proceed *ex parte* in case of default. A commission to examine witnesses, and power to enlarge the time, were also contended for, and liberty to make an interlocutory award, after the manner of a Master's separate report in Equity.

But the writer concluded with observing that, in many cases, arbitrations have been more tedious, more expensive, and less satisfactory, than any action at law or any suit in equity, and that it was quite erroneous to suppose that arbitrations were beneficial to the public. It is manifest, indeed, that in consequence of the number of meetings which usually take place under arbitrations, the delay and expense which attend them generally exceed those of a trial.

But the ground on which the public is likely to condemn *compulsory* references appears to be, that it will deprive the parties of the right to have their cases determined by a Jury, under the direction and assistance of the eminent learning of one of the Judges of the Superior Courts. Where the parties voluntarily concur in referring the question, however dissatisfied either or both of them may be at the result, they can blame themselves only; but the case is different when an arbitration is forced upon them. And though it is proposed they should have the choice of the referees, if they can coincide in exercising it, still there is frequent difficulty in finding competent persons who will undertake the office—often a very thankless one. The fittest persons, on account of their experience and judgment, are generally too much occupied to devote sufficient attention to such matters.

Another objection is, that the parties and their advisers are seldom, if ever, made acquainted with the *grounds* on which the decision has been made. For aught they know, the question may have been determined by lot. As no reasons have been assigned for the conclusion, there is no evidence that the premises have been understood. It is, indeed, not a little singular, that these encroachments on the province of a Jury and the advantages of a public trial, should have excited no remark from those Journals which are usually very eloquent on such occasions.

Again, it is to be observed that an arbitration necessarily precludes an *appeal* on the merits to a superior tribunal. A mistake by one of the Judges of the land is subjected to the most free discussion, and is readily corrected; but an arbitrator is supposed to be infallible in his judgment, and nothing short of corruption on his part, or an admitted mistake, will entitle the party to seek for further investigation.

The long period during which the measure has been before Parliament—upwards of eighteen months—may be supposed to manifest some reluctance in passing it into a law; and we observe that after it passed the House of Lords and had gone through a Committee of the Commons, it was recommitted; but on what ground it has been thus retarded does not appear.

There is one clause of a saving nature, namely, that in actions involving any question of law or matter of fact, a special case may be ordered, or a trial take place; but these remedial measures are solely in the discretion of the Court or Judge.

Then, again, if the parties cannot agree to name an arbitrator, the Court or Judge is limited to the choice of an "officer" of the Court, or of the Judge: the reason for this restriction we cannot discern. The officers of the Superior Courts are, no doubt, very respectable persons, but surely cannot be the most proper to take charge of the infinite variety of cases which occur in the Courts of Justice. Besides, it is by no means clear who are to be deemed "officers of the Court or Judge," within the meaning of the proposed act. Are they the Associate, Marshall and Clerk of Nisi Prius, or who else? And where the reference is ordered by a Judge at Chambers, who is to be considered the officer of the Judge?—his Clerk, or what other person? It seems, also, that the time for making applications to the Court against the decision of a single Judge, is far too limited; four days only are allowed: it should surely be, at the least, one week.

On the whole, we think that, with the utmost respect for the eminent Judge by whom the bill was brought forward, there are so many serious objections to the principle of compulsory arbitration, and so many details necessary to be considered after the principle has been established, that we trust it will be postponed until another Session, and, in the mean time, the wishes of the public, as well as the opinions of the profession, more extensively ascertained.

SUPERIOR COURTS.

ROLLS COURT.

SPECIFIC BEQUEST.—ASSENT OF EXECUTOR.—DEBTS.—LEGACIES.

A leasehold estate specifically bequeathed is not subject to annuities and pecuniary legacies; nor is it so subject where the legacies are, in case there is not sufficient personal estate, charged upon the real estate.

The purchaser of a leasehold estate from a cestui que trust *under a will, the latter having been in possession many years by permission of the executor, before the sale was effected, is not liable to the debts of the testator, it being assumed that the executor had assented to the sale.*

Joseph Clayworth, by his will dated the 4th day of October, 1800, gave and devised all his messuages, cottages, lands, tenements, and hereditaments, situate in Candlesby or elsewhere, as well freehold as copyhold, his copyhold estate being then surrendered to the use of his will, unto his second son, Joseph Clayworth, to hold to him, his heirs and assigns for ever; and he also gave and devised to his said son, Joseph Clayworth, all his leasehold estates for years, situate in Candlesby, which were held under the president and scholars of Magdalen College, Oxford, to hold to him for all such term, estate, and interest, as the testator might have therein respectively at the time of his decease: and he also gave and bequeathed unto the plaintiff, Bateman Clayworth, one annuity or clear yearly sum of 20*l.*, to be issuing and chargeable upon all his real estate; the same annuity to commence from the day of his decease, and to be paid to her by his executors quarterly, during the term of her natural life, or so long as she should continue his widow: he also gave and bequeathed unto his eldest daughter, Ann Clayworth, a like annuity or clear yearly sum of 20*l.*, to commence from the day of his decease, and to be paid to her by his executors quarterly, during her natural life: and he also gave unto the plaintiff, Bateman Clayworth, and his daughter, Ann Clayworth, certain parts of his household goods and furniture. And the testator also gave and bequeathed unto his twelve children, Pacy, Thomas, John, William, Francis, Robert, Charles, Mary, Elizabeth, Martha, Alice, and Rebecca Clayworth, and to each of them, the sum of 100*l.* a piece, to be paid to them out of his personal estate, when, and as they should respectively attain the age of twenty-four years, with lawful interest; and he also gave and bequeathed to his brother, William Clayworth, the sum of 20*l.*, and to his sister, Mary Clayworth, the like sum of 20*l.*, to be paid by his executors out of his personal estate; and in case his personal estate should be insufficient for the payment of the just debts, funeral expenses, and the legacies, he charged all his real estate with the payment thereof, and also with the maintenance of his younger children; and as concerning all his ready money, securities for money, plate, linen, household goods and furniture, and all other his goods and chattels and personal estate, not before disposed of, he gave and bequeathed the same to Hussey Chapman and Robert Dawson, their executors and administrators, in trust, nevertheless, for the use and benefit of his son, Joseph Clayworth, his executors and administrators, and to be managed and disposed of by them as they should think most for his advantage during his minority, and to be by them or the survivor of them, or the executors or administrators of such survivor, assigned, transferred, and made over to him absolutely, on his attaining the age of twenty-four years; and he thereby constituted and appointed Hussey Chapman and John Dawson joint executors of his will, upon the trusts aforesaid, and guardians and trustees of and for all his children, during their minorities respectively.

The testator died in 1802, and his will was proved by Robert Dawson, the only surviving executor, who permitted Joseph Clayworth, the *cestuique trust*, to enter into possession of the copyhold and leasehold estates.

In 1816, Joseph Clayworth, the son, sold and assigned the leasehold estate for a valuable consideration to the defendant, Abbott. This bill was filed by the annuitants and legatees against Joseph Clayworth, Robert Dawson, the executor, Thomas Abbott, the purchaser of the leasehold estate, and other parties interested, for payment of their annuities and legacies.

Mr. *Agar* and Mr. *Duckworth*, for the plaintiffs.

Mr. *Bagshawe*, for the defendants.

Master of the Rolls.—I will declare that the testator did not by his will charge the leasehold estate specifically bequeathed with the payment of legacies, and that the executor having assented to the sale to Mr. Abbott, the bill as against him be dismissed with costs.

Declare that the leasehold estate was not charged with the payment of the pecuniary legacies; and that the leasehold estate having been sold, must be considered to have been sold with due assent of the executor, and therefore is not liable to the testator's debts; and that the bill against the defendant, Abbott, must be dismissed with costs to be paid by the plaintiff, without prejudice to the question as to whom, or out of what estate, the costs should be ultimately paid.—*Clayworth* v. *Clayworth*, June 7, 1832. M. R.

KING'S BENCH.

[Before the Four Judges.]

NUISANCE.

Making use of an inclosed ground for the purpose of pigeon-shooting, whereby persons assemble on the outside of the ground for the purpose of shooting the pigeons which escape, and in so doing commit trespasses on the adjoining lands, is an indictable offence.

Indictment for a nuisance, and in keeping

an enclosed ground for pigeon-shooting, near Bayswater.

Joy moved in arrest of judgment.—The defendant is not responsible for the acts of others. No danger or annoyance to the neighbours was occasioned by pigeon-shooting, which took place on the defendant's own ground—properly enclosed and secured. If he is liable to be convicted, he must be made responsible for the acts of others, who are committing a trespass on the ground surrounding his enclosure, and who assemble there to shoot the pigeons which escape from the persons shooting in his enclosure. It was proved, that the defendant employed a constable to drive away these people from his own ground. They then went on his neighbour's land, and committed the nuisance, for which it is attempted to make the defendant responsible. He is in the lawful enjoyment of his own premises, and ought no more to be liable to an indictment than the father of a pretty girl, whose beauty attracted a constant crowd of persons in the street, to the annoyance of the public. It is not sufficient that the annoyance is occasioned by the pigeon-shooting on the defendant's ground, unless the annoyance is the natural and inevitable consequence of the defendant's wrongful acts. *Vicars* v. *Wilcocks*, 8 East, 1.

Lord *Tenterden*, C. J.—The defendant wishes to enjoy his own ground, to the injury of his neighbours. If a man attract a crowd of people, to the annoyance of the public, no matter for what reason, no doubt he is responsible.

Littledale, J.—Although it was not the object of the defendant to bring these idle people together, it is the natural consequence arising from the pigeon-shooting which takes place in his ground, and he is answerable.

Taunton, J.—Common stages for rope-dancing, and play-houses, are indictable as nuisances, for drawing together disorderly persons, so as to prove an inconvenience to the neighbours.

The Court directed the defendant to enter into a recognizance with two sureties, to come up to receive judgment when required, and not to use the premises, or underlet them to be used, for the purpose of pigeon-shooting in future.—*Rex* v. *Moore*. H. T. Jan. 25th, 1832. K. B.

KING'S BENCH.—PRACTICE COURT.

PROCESS.—FILING AFFIDAVIT OF DEBT.—LATITAT.—BILL OF MIDDLESEX.

Where a defendant is arrested on a latitat, *after a bill of Middlesex issued but not executed, the affidavit of debt must be filed at the Bill of Middlesex Office.*

Archbold shewed cause against a rule obtained by *W. Clarkson*, for discharging the defendant, who had been arrested on a *latitat*, after a bill of Middlesex issued but not executed, on filing common bail, on the ground that the affidavit of debt had been filed at the King's Bench Office, instead of the Bill of Middlesex Office. The usual practice is to file the affidavit of debt at the Bill of Middlesex Office, and if an arrest is to be made in the county of Middlesex, a bill of Middlesex is sued out. But if no arrest is made on the bill of Middlesex, and process is sued out into another county, an office copy of the affidavit of debt is obtained, and taken to the King's Bench Office. That is the authority to the signer of writs for issuing the *latitat*. Here the original affidavit of debt was taken to the King's Bench Office. That must be sufficient authority for the issue of the *latitat*, since an office copy would suffice. That cannot be considered as an irregularity. Besides, an indictment for perjury might be supported on this affidavit, so filed. The fact of its having been filed at the wrong office, would be no answer to such an indictment.

W. Clarkson, *contrà*, was stopped by the Court.

Taunton, J.—The regular practice, in such a case, is to file the affidavit of debt at the Bill of Middlesex Office, and then to take an office copy to the signer of writs. The present proceeding, therefore, is not according to the regular practice. How does it appear, that this affidavit was ever filed at the Bill of Middlesex Office? It has not been filed according to the usual course of practice. I don't sit here to decide on the different degrees of excellence in different modes of practice; but as a certain mode has been established, that ought to be adopted. It is important that the boundaries of the different proceedings in the different offices should be preserved; as otherwise constant disputes would arise between the offices. The rule must therefore be made absolute.

Rule absolute. *Wood* v. *Stone*, April 26, 1832. P. C.

COSTS.—EXPENSES OF PROSECUTION, 7 GEO. 4. c. 64, § 22.

Where an indictment on the 7 & 8 *Geo.* 4. *c.* 30. § 16, *is removed by* certiorari *into the King's Bench, and is tried on a record issuing out of that Court, the expenses of prosecution cannot be allowed under the* 7 *Geo.* 4. *c.* 64. § 22.

Comyn applied for a rule to shew cause why costs, under the 7 G. 4. c. 64. § 22, in the case of an indictment on the 7 & 8 G. 4. c. 30. § 16, should not be allowed to the prosecutor. The indictment was for maliciously killing a horse. The defendant was convicted, and sentenced to transportation for fourteen years. An application was made, as soon as the defendant was sentenced, to *Tindal*, C. J., who tried the indictment, to allow the expenses of prosecu-

tion. He doubted his power so to do, and therefore referred the prosecutor to the Court. The words of the 7 G. 4. c. 64. § 22, are these: "That the Court before which any person shall be prosecuted or tried for any felony, is hereby authorized and empowered, at the request of the prosecutor, or of any other person who shall appear on recognizance or *subpœna* to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expenses which such prosecutor, shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution, of such sums of money as to the Court shall seem reasonable and sufficient to reimburse such prosecutor, and witnesses for the expenses they shall have severally incurred in attending before the examining magistrate or magistrates, and the grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein." The "Court" here, must mean the Court before which the case was tried. That Court was the King's Bench, the record of which, the Judge at *Nisi Prius* was trying. The offence here was a felony; and therefore, if the Court were of opinion that the prosecutor was intitled to his costs, he must be intitled to them under the 22d section of the 7 G. 4. c. 64. There is a decision of the King's Bench on section 23, which applies to misdemeanours, in 8 B. & C. 420. It is the case of *The King* v. *Richards and others*. The case there was, "In pursuance of a recognizance entered into before magistrates, the prosecutor, at the Quarter Sessions for Salop, preferred an indictment against the defendants for a riot; and the grand jury having found it a true bill, he afterwards removed it into this Court by *certiorari*. The defendants were tried and convicted at the last Spring Assizes for the county of Salop, and in Easter term *Campbell* moved for a rule to shew cause why the prosecutor should not have his costs allowed, under the 7 G. 4. c. 64, § 23, by which, it was enacted, "That where any prosecutor or other person shall appear before any Court, on recognizance or *subpœna*, to prosecute or give evidence against any person indicted of any assault with intent to commit felony, of any attempt to commit felony, of any riot, &c., every such Court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as Courts are hereinbefore authorized and empowered to order the same in cases of felony."

The Court took time to consider of the application; and now, Lord *Tenterden*, C. J., said, that the matter had been considered by the twelve Judges, who were all of opinion that the act does not apply to cases where the indictment has been removed into the Court of King's Bench by *certiorari*.

Taunton, J.—The Court having already decided on the construction of the 7 G. 4. c. 64. § 23, which relates to misdemeanours, it has decided on the construction of sect. 22, which relates to felonies. Expenses are to be granted "in the same manner" in cases of misdemeanour, "as in cases of felony." The Court therefore, by deciding that the expenses are not to be allowed in case of misdemeanour, it has, in fact, decided that they are not to be allowed in cases of felony.

Rule refused[a].—*Rex* v. *Kelsey*, E. T. April 28th, 1832. K. B. P. C.

COSTS.—JUDGE'S ORDER.

An order, though drawn up, has no operation till served.

Platt shewed cause against a rule obtained for setting aside final judgment for irregularity, on the ground of an order for time to plead having been before obtained. He said the case was this: Time for pleading expired on Saturday. On that day, a summons for time to plead was obtained. On the Monday morning following, judgment was signed; and in the evening of that day, the order for time was served on the plaintiff's attorney.

Justice, in support of the rule, admitted that was the fact, but that the order was in fact drawn up on the Saturday. At all events, he trusted the Court would make the rule absolute without payment of costs, as the plaintiff's attorney attended the summons, and knew of the order for time being granted.

Taunton, J.—It is a rule of practice, that though the opposite party may have had notice of the order, yet unless served, it is not considered as an order. With respect to costs, he said he wished it to be equally understood, that costs would follow the usual course, unless there was something very extraordinary to take the case out of the general rule.

Rule absolute, upon payment of costs.—*Anon.* K. B. April 30th, 1832. P. C.

FORM OF AFFIDAVITS.

Wightman moved for judgment on an old warrant of attorney. The affidavit stated, "that the defendant was alive since the commencement of the term, and is still living, as he believes."

Taunton, J. objected that the affidavit was not sufficiently positive.

Wightman contended that the words "as he believes," applied to the part of the sentence immediately previous.

Taunton, J. said that it overrode the whole

[a] The rule, if granted in this case, would have been served on the Treasurer of the county of Kent, as the proper representative of the county in such a case, and therefore the proper person to shew cause.

sentence, and made the affidavit defective [a].—*Anon.* E. T. April 30th, 1832. P. C.

INTERPLEADER ACT, 1 & 2 W. 4. c. 58. §. 6.—SHERIFF.—LIEN.

The Court will relieve the sheriff, under the 1 & 2 W. 4. c. 58. § 6., in the case of a conflicting claim on property seized by him, though that claim is only of a lien, &c. of the whole property.

Steer shewed cause, on the part of the judgment creditor, against a rule obtained by *W. Clarkson* on the part of the Sheriff of the county of Kent, under the 1 & 2 W. 4. c. 58. § 6. (2 Dowling's Statutes 571.), calling on the parties claiming certain property seized by the sheriff under a *fi. fa.* The facts of the case were these:—A gentleman named Baynton had sent two horses and two servants to the house of an innkeeper, named Birch, in the county of Kent. There he had left them. After a considerable sum had become due for the keep of the horses and the board and lodging of the servants, both the servants went away, taking with them one horse. Afterwards a *fi. fa.* issued against Mr. Baynton's goods, and the sheriff seized the remaining horse at the stables of Mr. Birch. The latter refused to permit the horse to be removed, claiming a lien on it for his claim on Mr. Baynton, for the keep of the two horses and the board and lodging of the servants. The sheriff therefore found it necessary to apply for relief under the Interpleader Act.

V. Richards appeared on the part of *Birch*.

W. Clarkson appeared for the plaintiff.

Taunton, J.—I feel some doubt, whether this case is within the act. The sum in dispute is very small, and therefore it is hardly worth directing an issue, to try the rights of the parties. It would perhaps be better that the Court should decide upon the question of lien, if it should be of opinion that the present case comes within the meaning of the statute.

This suggestion of the Court was accepted by all parties. *Cur. ad. Vult.*

April 30th.

Taunton, J.—I have conferred with the other Judges; and we are of opinion, that although the act, from its language, should seem to have in view only those cases in which the entirety of the property is claimed, yet the letter of the act will comprehend cases of claims of lien as well as of absolute property. This section (6), which has for its object to quiet claims where the sheriff is concerned, extends to the present case. It is also to be observed, that in the commercial world a lien may be equal to the entire value of the goods. We are further of opinion, that there is no pretence for saying that there is any legal claim of lien on this remaining horse, in respect of the board and lodging of the servants. That is perfectly clear. But we are of opinion, that as the two horses were brought at one and the same time, and therefore under one contract relating to both, the lien of the innkeeper upon both survives as to the remaining one. The innkeeper must therefore be paid the amount due for the keep of horses. The rule therefore will be enlarged until that is done; and when it is done, the rule will be discharged without any costs at all. The case of *Blake* v. *Nicholson*, as to lien, is very like the present. There it was holden, that "a printer, employed to print certain numbers, but not all consecutive numbers of an entire work, has a lien upon the copies not delivered, for his general balance due for printing the whole of those numbers."

Rule enlarged. *Ford* v. *Baynton*, Easter Term, April 28, 1832. K. B. P. C.

[a] This case is mentioned to draw attention to the mistakes which are frequently made in affidavits, by the improper position of the words. From want of attention to this particular, parties are frequently put to expense and inconvenience. The affidavit should have been, "that the defendant was alive since the commencement of the term, and is, as deponent believes, still living."

KING'S BENCH.

SITTINGS AFTER TRINITY TERM.

Common Juries.

MIDDLESEX.		LONDON.	
Monday	June 18	Tuesday	June 19
Wednesday	20	Friday (Adj. day)	29
to		to	
Saturday (inclusive)	23	Thursday (inclusive)	July 5

Special Juries.

Monday	June 25	Friday	July 6
to		to	
Thursday (inclusive)	28	Saturday (inclusive), the last day of the Sittings.	14

COMMON PLEAS.

SITTINGS AFTER TRINITY TERM.

Common Juries.

MIDDLESEX.		LONDON.	
Monday	June 18	Tuesday	June 19
Wednes. (Adj. day)	20	Friday (Adj. day)	29
Thursday	21	till	
		Saturday	July 14

Special Juries.

Friday	June 22	(Not yet fixed.)
to		
Thursday (inclusive).	28	

*** Bills of Exchange, and undefended Causes, will be tried on Saturday the 30th of June.

CIRCUITS OF THE JUDGES.

England and Wales.

SUMMER CIRCUITS. 1832.	HOME.	NORFOLK.	N. WALES & CHESTER.	S. WALES & CHESTER.	MIDLAND.	OXFORD.	NORTHERN.	WESTERN.
	L Tenterden B. Bayley	LCJ. Tindal J. Gaselee	LLyndhurst	J. Alderson	J. Park B. Vaughan	J. Bosanquet B. Gurney	J. J. Parke B. Bolland	J. Taunton J. Patteson
Satur. July 7	- -	- -	- -	Cardiff	- -	- -	- -	- -
Saturday 14	- -	- -	Welch Pool	Carmarthen	- -	- -	York & city	- -
Monday 16	- -	Bucking-	- -	-[& boro'	Northamp-	Abingdon	- -	Winchester
Wednesday 18	Hertford	[ham	Dolgelly	- -	- [ton	Oxford	- -	- -
Thursday 19	- -	Bedford	- -	- -	- -	- -	- -	- -
Friday 20	- -	- -	- -	- -	Oakham	- -	- -	- -
Saturday 21	- -	Huntingd'n	Carnarvon	Haverford-	Lincoln and	Worcester &	- -	New Sarum
Monday 23	Chelmsford	Cambridge	- -	[west&town	- [city	- [city	- -	- -
Wednesday 25	- -	- -	Beaumaris	Cardigan	- -	- -	- -	- -
Thursday 26	- -	Bury St. Ed.	- -	- -	- -	Stafford	- -	Dorchester
Friday 27	- -	- -	- -	- -	Nottingham	- -	- -	- -
Saturday 28	- -	- -	Ruthin	Brecon	- & town	- -	Durham	- -
Monday 30	Maidstone	Norwich &	- -	- -	- -	- -	- -	- -
Tuesday 31	- -	- [city	- -	- -	- -	- -	- -	Exeter &
Wed. Aug. 1	- -	- -	Mold	Presteign	Derby	Shrewsbury	Newcastle	- [city
Saturday 4	Lewes	- -	Chester	Chester	Leicester &	Hereford	-[& town	- -
Monday 6	- -	- -	- -	- -	- [boro'	- -	Carlisle	- -
Tuesday 7	- -	- -	- -	- -	- -	- -	- -	Bodmin
Wednesday 8	- -	- -	- -	- -	- -	Monmouth	- -	- -
Thursday 9	Guildford	- -	- -	- -	Coventry &	- -	- -	- -
Friday 10	- -	- -	- -	- -	[Warwick	- -	Appleby	- -
Saturday 11	- -	- -	- -	- -	- -	Gloucester	- -	- -
Monday 13	- -	- -	- -	- -	- -	- [& city	Lancaster	Wells
Saturday 18	- -	- -	- -	- -	- -	- -	- -	Bristol

NOTES OF THE WEEK.

House of Lords.

PRESCRIPTION.

The Bill "for shortening the time of Prescription in certain cases," has passed this House.

TITHES' PRESCRIPTION.

Some amendments of this Bill have been made, reported, and agreed to.

ANATOMY.

This Bill is ordered to a Committee of the whole House.

FINES AND RECOVERIES.—LIMITATION OF ACTIONS.—INHERITANCE.—CURTESY.

These Bills having been brought from the Commons, have been read a first time in this House.

House of Commons.

CORONERS.—BIRTHS' REGISTRATION.—SHERIFFS' EXPENCES.

Waiting for further consideration of the Report.

GENERAL REGISTER.—STATUTE OF FRAUDS.—ATTESTATION OF INSTRUMENTS.

Waiting for the second reading.

PRIVILEGES OF PARLIAMENT.—DOWER.—ARBITRATION.—EXCHEQUER COURT OFFICERS.—WITNESSES IN EQUITY.

Waiting for Committee.

USURY.

The second reading of this Bill deferred till the 27th instant.

NEW CHAMBERS FOR THE COMMON LAW JUDGES.

We understand that the Society of Serjeants Inn has offered to pay 10,000*l.* towards the expense of building new Chambers for the Common Law Judges, and that Plans of the Building have been prepared. We trust that there will be ample accommodation for the Practitioners in attendance on the Judges. It is suggested that two rooms should be provided for them: a large one for general business, and another for those who wait to attend the Judge in rotation. In order to expedite this desirable object, a Petition has been prepared and signed by the Committee of Management

of the Incorporated Law Society. It will remain for some days at the Society's Hall to receive the signatures of other Attorneys and Solicitors, and will then be presented to the House of Commons. We recommend every Practitioner to sign it, for unless the matter be urged forward at this favourable period, it may be again indefinitely deferred.

REGISTER OFFICE OF THE COURT OF REVIEW.

In consequence of the Petition signed by the most respectable Practitioners in London (a copy of which we inserted at their request, Vol. III. p. 239), the Court of Review has come to the determination of removing the Office of their Registrar from Basinghall Street to the neighbourhood of Chancery Lane. The Lord Chancellor (as we stated on the 9th instant) having signified that offices should be provided in case the Court required them, we understand that part of the Secretary of Bankrupt's Offices will be appropriated for the purpose. We hail this disposition on the part of "the Authorities" to consult the convenience of the members of the Profession, and which will at the same time conduce to the more accurate and speedy transaction of legal business.

ANSWERS TO QUERIES.

LAW OF PROPERTY AND CONVEYANCING.

EXECUTOR.—RESIDUE. P. 84, *antè*.

1. The executor is entitled to the residue of the testator's property. In the case of *The Bishop of Cloyne* v. *Young*, 2 Ves. 96, it was held, that by the mere appointment of an executor, the residue is given to him, unless the will contains a strong and violent presumption to the contrary; and by the cases of *Clennell* v. *Lewthwaite*, 2 Ves. jun. 471; *Dicks* v. *Lambert*, 4 Ves. jun. 729; and *Pratt* v. *Sladden*, 14 Ves. jun 197, the law on the point appears to be quite settled. J. J. S.

2. With great deference to the judgment of F. N. L., I cannot refrain from making a few brief remarks on his answer, contained in your publication, No. 85, as I certainly think he is unconsciously labouring under a mistaken idea respecting the case cited by him reported in Bro. Ch. Rep. 201. On reference to my question, p. 48, F. N. L. will find I mentioned that *no specific legacy* was bequeathed to the executor; and in the case in Brown's Rep. it is stated respecting the rule generally acted upon, "It is founded rather on an implied intent to bar the executor, than to create a trust for the next of kin; and therefore, if the executor *have a legacy*, and there be no next of kin, a trust shall result for the Crown."—But does not the fact of there being no legacy to the executor alter the question materially?

R. B.

QUERIES.

COMMON LAW.

STAMP ACT.—LEASE FOR A YEAR.

If a lease for a year runs to upwards of thirty folios, is a second stamp necessary? As the stamp act is silent on this point, would it be safe to have only one stamp?

W. R. C.

STAMP ACT.—LEASE.

A. grants a lease to *B.* for fourteen years, with a power for either party to determine it, by giving six months notice previous to the expiration of the first seven years. *B.* wishes to continue for the whole term, which *A.* consents to on *B.* paying an additional rent. It is proposed they shall both release the power of determining the lease, *B.* covenanting to pay the additional rent. What stamp will be required? Will it require *two* 1*l.* 15*s.* stamps for the releases, and an *ad valorem* for the additional rent? Or will *one* 1*l.* 15*s.* stamp, and an *ad valorem* for the additional rent, be sufficient? W. R. C.

MISCELLANEA.

SIR WALTER SCOTT ON THE CODE NAPOLEON.

While we admit the merit of the civil code of France, we are under the necessity of observing, that the very symmetry and theoretical consistency, which form at first view its principal beauty, render it, when examined closely, less fit for the actual purposes of jurisprudence than a system of national law, which, having never undergone the same operation of compression, and abridgment, and condensation, to which that of France was necessarily subjected, spreads through a multiplicity of volumes, embraces an immense collection of precedents, and, to the eye of inexperience, seems, in comparison of the compact size and regular form of the French code, a labyrinth to which no clue is afforded. It is of the greater importance to give this subject some consideration, because it has of late been fashionable to draw comparisons between the jurisprudence of England and that of France, and even to urge the necessity of new-modelling the former upon such a concise and systematic plan as the latter exhibits. In arguing this point, we suppose it will be granted, that that code of institutions is the most perfect, which most effectually provides for every difficult case as it emerges; and therefore averts, as far as possible, the occurrence of doubt, and, of course, of litigation, by giving the most accurate and certain interpretation to the general rule, when applied to cases as they arise. Now, in this point, which comprehends the very essence and end of all jurisprudence, the protection, namely, of the rights of the individual, the English law is preferable to the French in an incalculable degree; because each principle

of English law has been the subject of illustration for many ages, by the most learned and wise Judges, acting upon pleadings conducted by the most acute and ingenious men of each successive age. This current of legal judgments has been flowing for centuries, deciding, as they occurred, every question of doubt which could arise upon the application of general principles to particular circumstances; and each individual case, so decided, fills up some point which was previously disputable, and becoming a rule for similar questions, tends to that extent to diminish the debatable grounds of doubt and argument with which the law must be surrounded, like an unknown territory when it is at first partially discovered. It is not the fault of the French jurisconsults, that they did not possess the mass of legal authority arising out of a regular course of decisions by a long succession of judges competent to the task, and proceeding, not upon hypothetical cases supposed by themselves, and subject only to the investigation of their own minds, but upon such as then actually occurred in practice, and had been fully canvassed and argued in open Court. The French lawyers had not the advantage of referring to such a train of decisions, each settling some new point, or ascertaining and confirming some one which had been considered as questionable. By the revolution, the ancient French Courts had been destroyed, together with their records; their proceedings only served as matter of history or tradition, but could not be quoted in support or explanation of a code which had no existence until after their destruction. The commissioners endeavoured to supply this defect in their system, by drawing from their general rules such a number of corollary propositions, as might so far as possible serve for their application to special and particular cases. But rules, founded in imaginary cases, can never have the same weight with precedents emerging in actual practice, where the previous exertions of the lawyers have put the case in every possible light, and where the Judge comes to the decision, not as the theorist, whose opinion relates only to an ideal hypothesis of his own mind, but as the solemn arbiter of justice between man and man, after having attended to, and profited by, the collision and conflict of opposite opinions, urged by those best qualified to state and to illustrate them. The value of such discussion is well known to all who have experience of courts of justice, where it is never thought surprising to hear the wisest Judge confess that he came into Court with a view of the case at issue wholly different from that which he was induced to form after having given the requisite attention to the debate before him. But this is an advantage which can never be gained, unless in the discussion of a real case; and therefore the opinion of a Judge given *tota re cognita*, must always be a more valuable precedent, than that which the same learned individual could form upon an abstract and hypothetical question. It is, besides, to be considered, that the most fertile ingenuity with which any legislator can be endued, is limited within certain bounds; and that when he has racked his brain to provide for all the ideal cases which his prolific imagination can supply, it will be found that he has not anticipated or provided for the hundredth part of the questions which are sure to occur in actual practice. To make a practical application of what we have stated, to the relative jurisprudence of France and England, it may be remarked, that the Title 5, of the 1st Book of the Civil Code, upon the subject of Marriage, contains only one hundred and sixty-one propositions respecting the rights of parties, arising in different circumstances out of that contract, the most important known in civilized society. If we deduce from this gross amount, the great number of rules which are not doctrinal, but have only reference to the forms of procedure, the result will be greatly diminished. The English law, on the other hand, besides its legislative enactments, is guarded, as appears by Roper's Index, by no less than a thousand decided cases, or precedents, each of which affords ground to rule any other case in similar circumstances. In this view, the certainty of the law of England, compared to that of France, bears the proportion of ten to one. It is, therefore, a vulgar, though a natural and pleasing error, to prefer the simplicity of an ingenious and philosophic code of jurisprudence, to a system which has grown up with a nation, augmented with its wants, extended according to its civilization, and only become cumbrous and complicated, because the state of society to which it applies has itself given rise to a complication of relative situations, to all of which the law is under the necessity of adapting itself. In this point of view, the code of France may be compared to a warehouse built with much attention to architectural uniformity, showy in the exterior, and pleasing from the simplicity of its plan, but too small to hold the quantity of goods necessary to supply the public demand; while the common law of England resembles the vaults of some huge gothic buildings, dark indeed, and ill arranged, but containing an immense store of commodities, which those acquainted with its recesses seldom fail to be able to produce to such as have occasion for them. The practiques, or adjudged cases, in fact, form a breakwater as it were, to protect the more formal bulwark of the statute law; and although they cannot be regularly jointed or dovetailed together, each independent decision fills its space on the mound, and offers a degree of resistance to innovation, and protection to the law, in proportion to its own weight and importance.

The Legal Observer.

VOL. IV. SATURDAY, JUNE 30, 1832. No. LXXXIX.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

THE LAW RELATING TO ATTACKS ON THE KING.

Some doubt having arisen as to the mode of treating the late atrocity committed on his Majesty, it may be useful to see how the law stands on the subject.

"The life of the King," says Lord Hale, "who is the head of the body politic, and the cement of the social bond, cannot, in the ordinary course of things, be taken away by treasonable practices, without involving the whole nation in blood and confusion; and consequently, every stroke levelled at his person is levelled at the public tranquillity." This is the recognized rule on the subject; but the statute law is even more precise.

By the well-known act, 25 Ed. 3, st. 5. c. 2, which East calls "the standard of high treason," it is declared to be high treason "when a man doth compass or imagine the death of our lord the King, and thereof be proveably attainted of open deed by the people." But a late statute (36 G. 3, c. 7.) is more directly applicable to the late offence. It is thereby enacted (§ 1), that if any person, during the natural life of the king then reigning (Geo. 3), and until the end of the next session of parliament after a demise of the crown, shall, within the realm or without, compass, imagine, invent, devise, or intend death or destruction, *or any bodily harm tending to death or destruction, maim or wounding*, imprisonment or restraint of the person of the King, his heirs or successors, he being convicted thereof upon the oaths of two lawful and credible witnesses upon trial, or otherwise convicted or attainted by due course of law, then every such offender shall be deemed, declared, and adjudged, to be a traitor." This section of this last act is made perpetual by the 57 G. 3. c. 6. § 1.

Under these statutes it has been held, that the mere imagination of the heart, if any open or overt act be done towards effectuating the design, is deemed the same degree of guilt as if carried into actual execution.[a] Thus, menacing words are a sufficient overt act to prove the compassing of the King's death, if followed up by any act in performance of them, as in *Crohagan's case*,[b] who, being an Irish priest at Lisbon, used these words: "I will kill the King, if I may come to him," and afterwards came to England for this purpose; which being proved, he was convicted of high treason. If, therefore, there be menacing words, and they are followed up by any positive attempt to carry the menace into execution; or if, without any previous menace, any act be committed against the Sovereign, it is clear that the offender is guilty of high treason.

There are two other acts, which were passed soon after the attempt made by James Hatfield on his Majesty King George the Third, which bear on this subject.

By the 39 and 40 G. 3, c. 93, it is enacted, that in cases of high treason and misprision of treason, where the overt act alleged in the indictment shall be assassination of the King, or any attempt against his life or person, whereby his life may be endangered, or his person suffer bodily harm, the offender shall be tried in the same manner as if charged with murder, but punishable as in cases of high treason; and by the 39 and 40 G. 3, c. 94, if any person

[a] 1 Hale, 107. 1 Hawk. c. 17. s. 8. 1 East P. C. 58.
[b] Cro. Car. 332. Hale, 116.

charged with treason shall prove to be insane, the jury, if they acquit him, shall declare whether he was acquitted by them on account of insanity, and the offender shall be kept in custody till his Majesty's pleasure be known, and his Majesty may give an order for the safe custody of such insane person.

Among the many trials for high treason to be found in the books, there is scarcely one earlier than the reign of George the Third, in which the offence consisted in an attempt on the royal person. In the reign of that monarch, however, there were several attempts to assassinate him, and in two of the cases the offenders were taken, and dealt with according to law, although the course adopted was different in each.

On August 2, 1786, Margaret Nicholson attempted to stab the King as he was alighting from his carriage at the gate of his palace; but she having been examined by the proper person by order of the Privy Council, was declared insane, and sent to Bedlam Hospital, where she remained till her death.

In May 1800, James Hatfield made an attempt on the life of the King, by firing a pistol at him in Drury Lane theatre. In June he was tried, and acquitted on the ground of insanity, Lord Erskine having defended him, and making one of his greatest speeches on the occasion. In the late villainous attempt there is, it is understood, considerable doubt whether the offender is insane. He may therefore be brought to trial, which may be conducted under the act cited above, as if he were tried for murder.

ON THE EXAMINATION OF PERSONS APPLYING TO BE ADMITTED AS ATTORNEYS.

To the Editor of the Legal Observer.

SIR,

I have twice read, in the Legal Observer, remarks by correspondents, strongly recommending the examination of articled clerks previously to their being admitted attorneys. There is a brief communication on the subject in a recent number, p. 56. Both the correspondents have recommended its adoption, on the ground of its being, as they conceive, of indisputable utility. I beg now to offer a few remarks *contrâ*.

The effect "devoutly to be wished" from "subjecting" articled clerks to an examination is, it seems, that the professional body may, by means of such a filtering ordeal, become purer, and more learned. Would that effect be produced? One correspondent does not wish that "impediments" should by means of the examination "be thrown in the way" of the future attorney; and therefore suggests that it should be restricted to "points likely to arise in practice," and by no means to bewilder the embryo lawyer with "abstruse questions which would puzzle an experienced barrister." The other correspondent has favoured us with a few of such questions as would with propriety form part of the legal catechism. He would deem the clerk to be without sufficient legal lore to entitle him to admission, unless he could tell "the proper authorities" (the examiners), What are the various kinds of legal interests to be had in lands?—the peculiarities of each?—their subdivisions? The usual mode of conveying a fee simple?—the form of the conveyance?—its mode of operation? The different forms of action in use?—the characteristics of each? The difference between proceedings by bill, and by original?—and when the latter are necessary? What is a declaration?—a plea?—a *similiter*?—a *nisi prius* record?—*postea*?—judgment?—taxation of costs?—an execution?—how many kinds there are? What constitutes murder?—manslaughter?—justifiable homicide?—what felony in general?—what burglary?—what larceny?—what embezzlement?

This he considers to be an examination "of no great length," which would require *merely* a "*general acquaintance* with the leading *theoretical principles, and the practical details* of the law;" and that is *all* he would require the young attorney to be possessed of; indeed he considers it "all that under the circumstances he could be expected to possess." The youth whose head contains all the above knowledge, must indeed, under *any* circumstances, be a precocious one—at once a Coke and a Tidd—and doubtless, if every future attorney had sufficient legal knowledge to enable him, satisfactorily to a Judge, to go through an examination of which the above is a sample, the profession might become more learned; but it must not be forgotten, that to require an acute knowledge of the law in every practitioner, is not *alone* sufficient to keep "pettifoggers" out of the profession. An acute knowledge of the law is not the *only*, or principal safeguard, the public require, inasmuch as such knowledge is not necessarily accompanied with the virtue of professional integrity and uprightness; without which the possessor of much legal acumen would be a scourge, instead of a blessing to the community. A man's speculative theology may be very correct, without producing purity of life; so an accurate knowledge of the law may not secure an honest and upright practice of it.

In this view of the question, we may at once discover reason enough why a medical man ought to be examined previously to his practising; but which cannot be applied to an attorney. The medical man *cannot* make a bad use of his knowledge (as the unprincipled, though acute lawyer, may), unless we suppose the doctor would intentionally kill instead of cure his patient. The public cannot be too much guarded against the ignorance of a medi-

cal man, whose unskilfulness may so frequently be attended with destructive consequences; whereas the errors of an attorney, besides that they frequently recoil on *himself*, are comparatively trifling, and oftentimes reparable. One or two signal blunders, and his professional fate is sealed. The sun of his reputation is set for ever, and he is soon without a client. There is also this fact to be borne in mind: The whole (or nearly the whole) of the knowledge the examinant, who could answer the above questions, must possess, might (and ere long probably will) "at one fell swoop" be for ever annihilated by the sovereign and uncontroulable authority of parliament; and thus, to use an expression of our great champion of law reform, "all the curious learning" of the young lawyer would become practically useless; whereas no such mishap can befal medical knowledge, the principles of which are immutable as truth itself.

One of the correspondents whose views I am questioning, though, as before observed, he wishes not to throw impediments in the way of the future attorney, would deem him unfit for admission, unless he could produce the certificate of a law lecturer, of his having attended a whole course of lectures, "there being now so many opportunities for hearing lectures." These clerks who are domiciled in the metropolis may, perhaps, find time and money to attend lectures; but it is far otherwise with most clerks who reside in the country. To the latter, a course of lectures would be a considerable expense, by prolonging their stay in town, from which very many would not obtain an equivalent advantage in point of knowledge; at all events, it may be safely affirmed, that nine out of ten clerks would gain much more information, and much cheaper, by purchasing and carefully perusing the lectures when published, than they possibly could by merely hearing them delivered.

If it be advisable that an *attorney* should undergo a legal examination before admission, surely it is much more advisable that *barristers* should be examined before being called, or even practising below the bar. Is not ignorance in barristers more dangerous than in attorneys? Does not the barrister, generally speaking, advise in all matters of difficulty and importance? The barrister in Court, particularly, must have his knowledge at command the very instant it is wanted, or his client probably loses his cause; whereas the attorney has usually time to act with deliberation, and an opportunity to correct his blunder.

Your correspondents do not seem to have considered by whom the examination could conveniently be conducted. One speaks of them as "the proper authorities;" by which, I presume, he means the Judges. But surely even their increased number would be insufficient to perform this additional duty. Nobody would do it gratuitously; and by whom must such a functionary be remunerated?

Previously to the stat. G. 2. it was comparatively an easy matter to become an attorney. No clerkship was required; and, of course, no stamp on articles, no admission stamp, no certificate stamp; in short, the stat. 3 Jac. 1. c. 7. chiefly required that the attorney should have been found by his dealings to be a person of "honest disposition." If we can but get a set of honest lawyers, we may safely leave to themselves the regulation of their studies. The modern enactments regulating the qualification and practice of attorneys, coupled with the summary power of punishing possessed by the Courts over their officers, have, I think, rendered the profession efficient and reputable as a body; and if, notwithstanding such regulations and control, there be found dolts, unprincipled practitioners, or pettifoggers amongst us, it may be lamented, but must be endured. The legislature has secured to every young man destined to become an attorney, an opportunity during his clerkship, sufficient for acquiring the requisite knowledge to enable him to practise with reputation. The improvement of that opportunity depends on the clerk alone; and he *chiefly*, if not *alone*, is affected by the use he makes of that opportunity. Let our Judges be satisfied that every applicant for admission has duly gone through his probation as a clerk—that his character is good—that he is of "honest disposition," and they will discharge their duty to the public, and to the individual, by granting him a fiat.

J. P.

TABULAR VIEW OF ALL THE BILLS NOW BEFORE PARLIAMENT RELATING TO THE LAW.

(*Continued from page* 117.)

Existing Law.	Proposed Alteration.
ARBITRATION.	
By *consent* of parties only.	In cases of pecuniary demand, where there is more than one item on each side, a reference may be ordered by the Court or a Judge, either before or at the trial; and if the parties do not agree on an arbitrator, an officer of the Court or Judge to be appointed. Special cases or trials may be ordered. Costs to abide the event. Witnesses compellable to attend and to produce documents. Arbitrator to administer oath. No revocation without leave of Court. Enlarging time.

Existing Law.	Proposed Alteration.
REGISTRATION OF BIRTHS.	
The registration of *baptisms*, not of *births*, is at present provided for.	Parish Clerks, on the application of the father or mother, or any person present at the birth, shall enter, within three months, the names and surnames of the child, the parents, and day of birth. Duplicate entries to be deposited with the Clerk of the Peace, and tables of returns sent by him to Registrar of Court of Chancery. Certified copy from book of Clerk of Peace to be evidence of *birth*, *age*, and *relationship*, of those whose names are so registered. But the act not to affect the existing laws regarding *baptisms*.
REGULATION OF SHERIFFS.	
	Grand Jury to furnish the Judges of Assize with the names of six persons qualified to serve as Sheriff. The Judge to transmit three names to the Privy Council, from which his Majesty shall nominate one.
Undersheriff ineligible for two successive years.	This disqualification to be removed.
Sheriffs no power of swearing in special constables.	This power to be conferred.
Great expense in the time of assizes and other public occasions.	To give no fees or presents to Judges or their officers. Nor to find lodgings. Javelin-men to be cloathed and provided by the county. The Judges to be received at the town house, or lodgings. No Justices' wages, or convict money. The undersheriff not required to go to London to pass his accounts, unless specially ordered.

Existing Law.	Proposed alteration.
PRIVILEGE OF PARLIAMENT.	
Members protected from personal arrest. Bankrupt and insolvent members do not forfeit their seats.	Process against the person, issuable on judgment, recognizance, decree, order, or other final process, but not to be executed. Personal demand before process. The process then to issue, and be delivered to Clerk of House of Commons. After expiration of the time to be fixed, if the sum continue unsatisfied, the seat of the member to be vacated. Not to be re-elected. No person in custody, or insolvent, to be elected. Seat of bankrupt member to be vacated, if *fiat* not superseded within a certain time. No privilege available against the commission or *fiat*.
EXCHEQUER OF PLEAS OFFICERS.	
This act does not appear to concern any extensive class of the profession, except as fees are continued for the purpose of providing compensation for former officers, and to create a fund for the payment of the present officers.	

[*To be continued.*]

SUBSTANCE OF THE FOURTH REPORT OF THE COMMON LAW COMMISSIONERS.

IMPRISONMENT FOR DEBT.

We have just perused this Report, and hasten to put our readers in possession of the conclusions at which the Commissioners have arrived. We observe that the Report contains the signatures only of Mr. Pollock, Mr. Starkie, Mr. Evans, and Mr. Wightman. Mr. Serjeant Stephen dissents from his brethren, on the ground that he has not been able to satisfy himself that it would be right or safe to advance so much farther in favor of the liberty of the person as to abolish either *arrest in execution*, or *arrest before judgment*, or to restrain the latter to the case

of meditated flight. He is inclined to think that these checks upon the fraud, remissness, and improvidence of the debtor, ought to be maintained in the full force which still belong to them. He even doubts whether they have not been already too much relaxed.

The following are the recommendations of the four Commissioners who have concurred in opinion: They think that in principle the power of arrest ought to be confined to actual or meditated fraud; and that to allow a party to be imprisoned at the will of a private individual, acting for his own benefit, without any imputation of fraud, is not only inconsistent with any sound principle of justice, but is wholly at variance with the spirit and policy of the law of England in other respects, and, with little exception, is contrary to the practice of every nation in Europe.

They contend that the evils which result from the present practice are, in a great measure, if not wholly, attributable to an extension of the practice of arrest beyond the limits of this principle, in allowing the power to be exercised for the enforcement of payment without resistance, a purpose foreign not only to the original intention of an arrest, the compelling an appearance, but even to the professed object to which it was afterwards, and for which it is now in legal contemplation used—the securing the person of the debtor to await the final judgment of the Court.

The Commissioners think that the mischief and inconvenience, of which creditors chiefly complain, and against which the power of arrest is no effectual remedy, may be greatly alleviated, if not wholly removed:

1. By providing cheaper and speedier means for the recovery of such debts as are usually the foundation of arrest.

2. By providing that interest shall be recoverable on all debts, from the commencement of the action down to the time of execution.

3. By enabling creditors to recover the full amount of costs reasonably incurred in prosecuting suits.

4. By affording to creditors a more summary remedy on written, and particularly mercantile securities.

5. By holding out inducements to debtors to make a cession of their property at an early stage of their difficulties, for the benefit of creditors.

They state their belief, that temptations to fraud and to delay will be greatly diminished by making all kinds of property which are subject to the claims of creditors under the bankrupt and insolvent laws, liable to the execution of the judgment creditor.

And by the infliction of certain and severe penalties on such debtors as abscond, or remove, conceal, or alien property in fraud of their creditors after the commencement of the suit.

Such provisions being made for the security of the creditor, they recommend that no one shall be arrested for debt unless the plaintiff, or some one on his behalf, shall make oath that a debt to the amount of 20*l.* is due, and that he believes the defendant is about to abscond.

Or unless a Judge of one of the Superior Courts shall make a special order of arrest.

They also are of opinion, that the party may be arrested either as the first step in the cause, or in any subsequent stage of the cause.

But that in all cases of arrest, it shall be competent to the party arrested to apply to the Court, or to a Judge, for relief.

The Commissioners, in support of these suggestions, make the following observations:

That the power of arrest ought to be modified, they admit; that whilst the power given to arrest a debtor who would otherwise evade liability, by removing beyond the reach of his creditor, is warranted by plain and just principles, the object is to prevent the commission of a fraud of which a debtor would be guilty in withdrawing from legal responsibility; and any abuse of the power would in a great measure be prevented, by enabling the party arrested to make immediate application for relief.

In other cases of fraud, but where the debtor was not likely to abscond, they conceive that ample provision would at once be made for the security of the creditor and the liberty of the subject, by confiding a discretionary power of arrest to the Judges of the Superior Courts, with power to discharge the prisoner after arrest or cause shown, with costs where such arrest should appear to have been malicious, and without probable cause.

In support of the proposition, that "by providing cheaper and speedier means for the recovery of debts such as are usually the foundation of arrests," they urge that it is most desirable that means should be provided for enabling the creditor to make the debtor's property available in satisfaction of his debt at the earliest opportunity consistent with justice. They consider the ordinary mode of proceeding by arrest to be in-

sufficient for this purpose; wherever the debtor is disposed to fraud, he has recourse to bail, which renders the arrest productive of increased expense and delay. The average length of time which intervenes between the issuing and return of a writ in one of the Superior Courts at Westminster, is not less than two months; they see no reason why the return should not be so expedited as to enable a plaintiff to obtain a judgment in a shorter time. The process in such cases would consist merely in the service of a summons; the proceedings in such actions are usually simple, indeed, merely formal; the bill of particulars, the preparation of which requires no technical skill, contains in general the best and most satisfactory notice to the defendant of the real nature of the claim.

"By providing that interest shall be recoverable on all debts from the commencement of the suit till actual execution," the Commissioners conceive that a direct motive to unjust resistance will be taken away.

"By providing that creditors shall be entitled to recover full costs," actually and necessarily incurred, which exceed those allowed on taxation, they consider, that a consideration which tends to deter creditors from prosecuting their rights, and an encouragement to fraudulent debtors to resistance, will be at an end.

In favor of the plan of affording greater security to creditors on written, especially mercantile securities, it is remarked, that in cases where a debtor has acknowledged a debt, by executing a money bond, or by the acceptance of a bill of exchange, or by his signature to a promissory note, a plaintiff is frequently put to the expense and delay of a trial. They propose, in remedy of this abuse, that in all cases where a debt is claimed by virtue of a bond, bill of exchange, or promissory note, executed, drawn, accepted, or made by the defendant, the plaintiff, after having filed an affidavit of the sum due to him on such security, and also an affidavit of execution, shall, on the service of process on the defendant, be entitled to give notice that judgment will be signed, unless within a specified number of days next after the service of such notice, the defendant shall either give security, to be approved of by the master or some other officer of the Court, for the payment of the debt and costs, in case the plaintiff shall obtain final judgment, or unless the defendant shall within that time show sufficient cause before a Judge of the Court, to the satisfaction of such Judge, why judgment should not be entered; and that where such security is not so given, the plaintiff shall be entitled to judgment, unless the defendant shall, on showing cause before the Judge, either deny his execution of such security on oath, or, admitting the execution, shall show to the satisfaction of the Judge that the cause ought to proceed without giving such security.

Where the defendant has acknowledged his liability, by executing a written security, it seems to be unjust that the defendant should be allowed to impose on the plaintiff the expense and delay consequent on a defence, without either giving security to protect the plaintiff against the costs of a defence, which is inconsistent with the defendant's own admission, or shewing that he had some reasonable or probable ground of defence.

The Commissioners then advert to the holding out inducements to a debtor to make a cession of his property at an earlier period of his difficulties, for the benefit of his creditors; and they observe, that the tendency of the law of arrest, in conjunction with the insolvent law, is to induce creditors to be severe, and debtors to be fraudulent. It would be much better policy (they say) to make it the interest of the one to be humane, and the other to be honest; and they think that these objects would be best attained by offering inducements to debtors to make a distribution of their property amongst their creditors before it is uselessly diminished in consequence of a succession of arrests by contending creditors, and by resistance, frequently the effect of irritation, on the part of the debtor.

With this view, they consider it would be desirable that a certain proportion of creditors in number and value should have the power of discharging the debtor from his liability altogether, and to make the consent of a smaller or a greater proportion to be necessary, according to the amount of the dividend; and to allow the insolvent a per centage on the amount of the dividend.

NEW JUDGES' CHAMBERS.

The following is the substance of the Petition to the House of Commons, to which we adverted last week:—It states, that for the convenient administration of justice, one of the Judges from each of the Superior Common Law Courts of Record is accustomed to attend

daily in Serjeant's Inn, Chancery Lane, for the purpose of hearing and determining applications relating to various interlocutory matters which arise in the course of legal proceedings. That in consequence of several recent Acts of Parliament and new Rules of Court, this branch of business has much increased, and the matters on which the Judges are called upon to determine are frequently of great importance, and counsel on both sides are frequently employed, who attend the Judges to argue the points in dispute. That the chambers or offices of the Judges, in which such business is transacted, are very small, old, and dark, and incapable of accommodating the number of persons who are constantly in attendance there during the hours of business; and the access thereto is inconvenient, and even dangerous, from the narrow and crowded state of Chancery Lane. That in term time the number of persons in attendance upon the Judges at Chambers frequently amounts to 500 daily, and sometimes to 700 and upwards. That in consequence of the crowded state of the Judges' Chambers, the attorneys and their clerks, and others in attendance, are often obliged to wait on the outside of the building in all weathers. That independently of the just claims of the public to proper accommodation for the administration of justice, the petitioners represent, that no dignitaries or officers of any of the Courts of Justice in England, are so insufficiently accommodated as the Judges of the three Superior Common Law Courts.

COURTS IN INDIA.

We avail ourselves of a recent publication[a], which seems to be executed with much care, to give a short account of the Courts in India, which we have collected from the tables prefixed to Mr. Annand's work.

The Supreme Court at Calcutta was instituted in 1773, in lieu of the Mayor's Court. It consists of a Chief Justice and three other Judges, who must be barristers of five years standing, and be named by the King. The jurisdiction of the Court extends to all British subjects in Bengal, Bahar, and Orissa, under the protection of the Company, in all matters civil and criminal; and also over British subjects and natives for contracts above 500 rupees, provided it was agreed in such contracts to abide by its decision. Appeals from this Court are to be made to the King in Council. The salary of the Chief Judge is 8000*l.*, and that of the Puisne Judges 6000*l.*; to commence, when they are in England, on embarkation; when in India, on taking office. They are restricted from entering into any traffic or trade, and from taking any presents. Offences brought before the Supreme Court are to be tried by a jury of British subjects residing at Calcutta. The Supreme Court may examine witnesses, and transmit evidence home, on a *mandamus* from the Court of King's Bench. On the death of any of the Puisne Judges, the Court shall consist of a Chief Justice and two other Judges only. The King may direct pensions to be paid to the Judges out of the revenue of India, after seven years service—to the Chief Justice, 2000*l.* per annum, and to each of the other Judges 1,500*l.* The salaries of the Judges cease on their quitting India. When a vacancy occurs in the office of Recorder, the junior Puisne Judge of the Supreme Court must take the office.

The Courts of Madras and Bombay are nearly similar to this, differing only in some trifling particulars. Recorders are appointed for Madras and Bombay, with a salary of 5000*l.* a-year. The salary of the Chief Judge, at Madras and Bombay, is 6000*l.*; and that of the other Judges 5000*l.*

Besides the Supreme Courts, there are, the Mayor's Courts at Calcutta, Madras, and Bombay, and the Country and Provincial Courts in other parts of the Company's territories; from which there is an appeal to the Governor-General and Council, as a Court of Record.

By the 21 G. 3. c. 70, all his Majesty's subjects are restricted from taking more than 12 per cent. per annum interest on money lent in the East Indies; and by 37 G. 3. c. 142. § 28, British subjects were prohibited from lending money to native Princes without the consent of the Court of Directors, or of the Governor in Council of one of the Presidencies: but these acts do not limit the rate of interest to be taken within the dominions of native independent sovereigns.

By the 33 G. 3. c. 52. § 67, all his Majesty's subjects, as well servants of the Company as others, are made amenable for all offences committed in any of the territories of native Princes.

[a] Brief Outline of the Existing System for the Government of India. By Alexander Annand, of Lincoln's Inn. Saunders & Benning, 1832.

UNIFORMITY OF PROCESS ACT.

We now resume our remarks on this Bill. We had deferred them in consequence of having understood that Rules for the purpose of carrying the Act into effect would be promulgated by the Judges before the end of the last term. Their various occupations, combined with the difficulty of establishing a new system of Practice which shall work efficiently with what remains of the old one, have prevented their Lordships from carrying their intention into effect.

The first section is in these words: "Whereas the process for the commencement of personal actions in his Majesty's superior Courts of Law at Westminster, is by reason of its great variety and multiplicity, very inconvenient in practice, for remedy whereof be it enacted, That the process in all such actions commenced in either of the said Courts, in cases where it is not intended to hold the defendant to special bail, or to proceed against a member of Parliament according to the provisions contained in the statute passed in the 6th year of the reign of his late Majesty King George the Fourth, intituled, 'An Act to amend the Laws relating to Bankrupts,' shall, whether the action be brought by or against any person entitled to the privilege of Peerage or of Parliament, or of the Court where such action shall be brought, or of any other Court, or to any other privilege, or by or against any other person, be according to the form contained in the schedule to this Act annexed, marked No. 1, and which process may issue from either of the said Courts, and shall be called a Writ of Summons; and in every such writ, and every copy thereof, the place and county of the residence, or supposed residence, of the party defendant, or wherein the defendant shall be or supposed to be, shall be mentioned, and such writ shall be issued by the officer of the said Courts respectively, by whom the process serviceable in the county therein mentioned hath been heretofore issued from such Court, and every such writ may be served in the manner heretofore used in the county therein mentioned, or within two hundred yards of the border thereof, and not elsewhere; and the person serving the same shall and is hereby required to indorse on the writ the day of the month and week of the service thereof."

These provisions will only affect non-bailable process issuing from the Courts at Westminster, and will not, by § 21, "abridge, alter, or affect the franchises and jurisdictions of either of the counties palatine of Lancaster or Durham, or of any officer or minister thereof." The mode of proceeding pointed out by this section, and the subsequent ones, by § 21, "shall be the only writs for the commencement of personal actions in any of the Courts aforesaid, in the cases to which such writs are applicable." All the law and practice as to the commencement and continuation of Real Actions will therefore remain the same. From the language of the beginning of this section, a doubt may arise whether process by original is abolished. The section says, "actions commenced in either of the said Courts." Now actions by original are not, in contemplation of law, commenced in the superior Courts of Law at Westminster, but in Chancery. One of the advantages arising from suing by original in the King's Bench, before the 11 Geo. 4. and 1 W. 4. c. 70, § 8, which made all writs of error on judgments in any of the superior Courts at Westminster, returnable in the Exchequer Chamber, was, that actions by original not being "first commenced" in the King's Bench were not within the statute of 27 Eliz. c. 8; and consequently, writs of error to judgments in such actions, were returnable directly in Parliament. (1 Tid. Prac. 102. 2 Tid. 1139, ed. 9. 1 Dowling's Stat. 373.) There is nothing inconsistent, in the other parts of this section, or of the others in the act, with the continuation of the mode of proceeding by original. Although peers, members of parliament, corporations aggregate, hundreds, cities, &c. will be liable to this particular process pointed out by the present act, and although provisions are made for the service of such process on corporations aggregate, hundreds, &c., there is nothing inconsistent in that with their being also liable to process by original,—in the same manner that common persons are now liable to be sued either by the ordinary process of the Courts or by original. This, it is conceived, must be the construction which the word "commenced" requires, if the analogy of the decisions on the stat. of Eliz., as to writs of error, is recognized. The words of the stat. of Eliz., it is true, are, "first commenced;" but the introduction of the word "first" can make no difference, since if an action is commenced in a particular Court, it is there "first" commenced; as there cannot be two commencements to an action. The word "first" appears to have been only introduced into that statute from

greater caution, but without communicating any greater force to the word "commenced."

But, as from the language of the preamble, the purview of the statute was to remedy the "great variety and multiplicity" of process for the commencement of personal actions, it is to be presumed that the legislature intended to abolish that mode; and as in point of actual practice, actions by original are commenced in the Superior Courts themselves, it is most probable the act would be construed as taking away process by original. This the more probably, as the modern mode of construing statutes would seem to be, to pay little or no attention to the language of the legislature, if the intention can be collected.

The word "County," in the first section, will of course extend to counties of cities and counties of towns, as they must be considered as counties also.

The provision as to the endorsement of the defendant's residence on the writ, will, it is conceived, be obligatory, and not merely directory; for the words of this section are similar to those of the 12 G. 1, c. 29, s. 2, as to the endorsement on the back of the writ or process on which a party shall be arrested, of the amount for which he shall be so arrested, viz. "the sum or sums specified in such affidavit shall be endorsed on the back of such writ or process." In *Whishard* v. *Wilder*, the Court decided *obiter*, that the stat. of 12 Geo. 1. was not obligatory, but directory. That opinion however was not necessary to the determination of the question before the Court, and Sir *James Mansfield*, in the case of *Hill* v. *Heale*, 2 N. R. 196, dissented from that opinion. If a Rule of Court orders that a thing shall be done, even without affixing a penalty, the Rule is held in general not to be directory; *à fortiori* would it not be directory in a statute. This, no doubt, would be the construction put on the present statute, from analogy to the construction put on Rule 2 H. T. 2 W. 4. That Rule directs, "that upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service, and attendance to receive debt and costs."—That rule was holden, by Mr. Justice *Taunton*, not to be directory, but obligatory; and therefore that process, without such indorsement, was irregular. See *Ryley* v. *Boissomas*, 4 L. O. 26.

The remainder of the section, after the direction as to the mode in which the process is to be issued, is new. It is provided, "That such writ may be served in the manner heretofore used in the county therein mentioned." What shall be a sufficient service of process has been a matter of question in the Courts. The service should be "personal," according to the words of 7 & 8 G. 4. c. 71. § 1; but in some cases the word "personal" has been construed with considerable laxity. Thus service by the post was, in one case in the Common Pleas, viz. *Aldred* v. *Hicks*, 5 Taun. 186, holden sufficient. But that case was overruled by that of *Redpath* v. *Williams*, 3 Bing. 443. In other cases it has been decided, that where a defendant refuses to accept a copy of process, it may be left in his house (*Wood* v. *Dodgson*, Barnes, 278); or where the defendant locked himself in, and the process was put through a crevice of the door (*Smith* v. *Wistle*, Barnes, 405). The practice of different Judges, however, varied, and sometimes service of a much less satisfactory description was admitted. In the case of *Digby* v. *Thompson*, decided in Easter term last, by Mr. Justice *Taunton*, in the Practice Court of the Court of King's Bench, the decision of his Lordship was, that the service must be personal, which might be either by leaving the process with the defendant, or bringing it clearly to his presence and knowledge[a]. This question came again before that Court during the last term, while Mr. Justice *Patteson* presided, in the case of *Thomson* v. *Pheney*. There, his Lordship recognized the decision of Mr. Justice *Taunton* in the previous term. In that case the plaintiff had declared *de bene esse*, and the service not having been personal, the question arose, whether, in case the defendant did not appear, the plaintiff could make such an affidavit of service as would entitle him, under 5 G. 2. c. 27. § 1, to enter a common appearance for him. It was suggested, that the service on *Pheney*, the defendant, there shewn, would, according to the practice of the Common Bail office, be sufficient to entitle the plaintiff to enter an appearance for the defendant. His Lordship took time to enquire as to that practice, and on a subsequent day, stated that "he had found the course pursued in that office to be most improper. All that was there required was, for the party who stated that he had served the process

[a] This case will be reported in "The Legal Observer."

to swear to having served the defendant personally, and then describe the particular manner of service, which manner might or might not be personal. The officer then told the party making the affidavit, that the service ought to be personal, and pointed out the defect in his affidavit; and then permitted him to file common bail for the defendant. His Lordship had conferred with the other Judges on the subject, and they were unanimously of opinion that an end ought to be put to such a practice. Directions had therefore been given to the Clerk of the Common Bails not to allow common bail to be filed for any defendant for the future, unless the party seeking to file it could make an affidavit alleging a service amounting to personal service." The service of writs under this Act will, therefore, be subject to a similar restriction. Before this Act, process could only be served in the county to the sheriff of which it was directed. If it were, the service was irregular. But in order to set aside the service, it was necessary that an affidavit should be made, that the place of service was not on the borders of the county, and that there was no dispute as to boundaries (*Webber* v. *Manning*, 1 Dowl. Prac. Rep. 24; see also Tidd's Forms, p. 179, 5 a. 9th ed.; and *Storer* v. *Rayson*, 4 D. &R. 179). If, however, it was quite clear that the place of service was not on the borders of the county, from the fact stated in the affidavit, the Court would set aside the service, as in one case, in Easter Term last, Mr. Justice *Taunton* set aside process, for service in a wrong county, where the affidavit only stated, that the place of service was full five miles from the borders of the county to the sheriff of which the process was directed.

It will be observed, that this section makes no provision as to the person to whom the process shall be directed. This must be a matter for provision by the Rules made by the Judges; for there was no general rule with respect to the direction of process before this statute. Thus an original was directed to the sheriff or sheriffs of the county, as was also a *latitat*; but the Bill of Middlesex had no direction (1 Tid. Prac. 109, ed. 9, and *ib.* 151). In the counties palatine, the process was directed to the Bishop of Durham or his Chancellor; to the Chamberlain of Chester or his Deputy; to the Chancellor of the Duchy of Lancaster or his Deputy; in the Cinque Ports, to the Constable of Dover Castle, his Deputy or Lieutenant; in Berwick upon Tweed, to the Mayor and Bailiffs of Berwick; in the Isle of Ely, to the Sheriff of Cambridgeshire; in the Borough of Southwark, to the Sheriff of Surrey.

This section, it will be observed, refers to a form contained in the schedule of the Act. The words of that form, so far as they are necessary for our remarks, are these: "We command you, that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court of, &c." "And take notice, that in default of your so doing, the said *A. B.* may cause an appearance to be entered for you, and proceed therein to judgment and execution."

Some difficulty will arise as to the mode of calculating these eight days mentioned in the process. The word "within," would naturally make the eight days as mentioned in the form, inclusive of both the day of service and the last day; but Rule 8, of H. T. 2 W. 4, directs, "That in all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules or practice of the Courts, the same shall be reckoned exclusively of the first day, and inclusively of the last day." The Rule and this Form are consequently at variance; for the eight days here not being expressed to be eight "clear" days, the rule applies. As it does apply, the effect of it is to make both days inclusive. This produces a difference in practice with respect to entering appearances for defendants, from that which existed under the 12 Geo. 1, c. 29, § 1, as altered by 5 Geo. 2, c. 27. Under those statutes, the plaintiff could not file bail, or enter a common appearance for the defendant, till the ninth day after the return of the writ; the defendant having all the eighth day to file or enter. It will also be observed, that by this form the eight days are calculated after the "service," while, by the former acts, they were calculated after the "return." This may, in many cases, operate to quicken the remedy of the defendant. Another doubt will also arise, with respect to the calculation of time, from the words of No. 2, in the schedule. The words of the entry of appearance by the plaintiff for the defendant are these: "G. H. attorney for the plaintiff, appears for the defendant C. D., according to the statute." On the words "according to the statute," it may be doubtful whether they refer to the present statute, or to the former statute. If to the former statute, still the same mode of calculation of time as that prescribed by the present act must

be adopted, on the principle that a later statute, inconsistent with a former one, repeals it.

It will also be observed, that no provision is made, either by the form or the section, for an affidavit of service, before appearance entered by the plaintiff. Such an affidavit was required by the 12 Geo. 1, c. 29. There was a difference of practice between the King's Bench and the Common Pleas, as to the person before whom such an affidavit could be made. In the King's Bench, it could not have been taken before a commissioner, who is concerned as attorney for the plaintiff; but in the Common Pleas it might (1 Tid. Prac. 242, ed. 9). The sixth Rule of the first division of Rules of H. T. 2 W. 4, removed that difference.

SUPERIOR COURTS.

KING'S BENCH.

[Before the Four Judges.]

SETTLEMENT.—HUSBAND AND WIFE.—RENTING TENEMENT.

The 6 G. 4. c. 57. does not prevent a man from gaining a settlement by marrying a woman who rents a tenement under the value of ten pounds, and resides on the estate for forty days.

Upon an appeal of the inhabitants of North Curry against an order made by two justices for the removal of —— Duncan and his children to North Curry, in Gloucestershire, the sessions confirmed the order, subject to the opinion of the Court of King's Bench, whether a settlement was gained under these circumstances:—The pauper married Elizabeth Loveday, who was in the occupation of a house and garden, which she rented at the yearly rent of three pounds only. They lived together for several years.

Justice and *Dover* now contended, that both orders were bad, and that no settlement was gained. They admitted, that before the 6 G. 4. it was held in *Rex* v. *Ynyscynhaarn*, 7 B. & C. 233, that under the statute of Car. 2, where a woman, who was tenant from year to year of a tenement under the yearly value of ten pounds, married, she communicated thereby a settlement to her husband, though she herself could not have gained a settlement. That case was certainly a strong one against them; but a distinction was to be drawn between that case and the present, inasmuch as the woman then came into possession as executrix, and not by a voluntary act of her own, as in the present case; and they said, that in all the cases, the estate had been cast upon the party, and had not been acquired by the party's own act. That there had as yet been no decision upon the 59 G. 3. c. 50. and 6 G. 4. c. 57. which enacted, that no person shall acquire a settlement by reason of settling upon, or renting a tenement, not being his own property, unless such tenement shall consist of a dwelling house, &c. *bonâ fide* rented by such person at and for the sum of ten pounds a year at the least, for the term of one whole year. The language of the statute of 13 & 14 Car. 2. c. 12. § 1. was different. By that act, a pauper could only be removed within forty days after his coming to settle upon a tenement under the yearly value of ten pounds, if he was likely to be chargeable to the parish. But it has been decided, that a person may not be removable, and yet that a settlement might not be gained. Here the woman was a renter at three pounds a year only. She could not of herself gain a settlement by such a renting, and how could she communicate to the husband a right which she herself could not have acquired? It would be converting, by the marriage, a 3*l.* rent into a 10*l.* rent, and would be a way of evading the provisions of the late acts by means of the female part of the community, and would enable paupers to gain settlements in direct violation of the express enactments of the legislature.

The Court, however, (stopping *Greenwood*, who was in support of the orders,) said, that *Rex* v. *Ilmington*, Burr. Sett. Cas. 566, shewed that a woman might communicate a settlement, though she could not get one herself; that they could not distinguish the cases cited from the present, and that the orders must be confirmed.—*Rex* v. *North Curry*, April 28th, 1832. K. B. F. J.[a]

KING'S BENCH.—PRACTICE COURT.

MORTGAGEE AND MORTGAGOR.

In an ejectment on a forfeiture in not paying mortgage money, the defendant is entitled to have proceedings stayed, under the 7 G. 2. c. 20, upon payment of the principal and interest due on the mortgage deed, with the costs incurred at law and in equity, without paying any by-gone interest, or the expense of preparing the mortgage deed, or any assignment of it.

C. Cresswell moved to review the master's report in an action of ejectment under these circumstances:—The lessor of the plaintiff was a mortgagee. The defendant had moved to stay proceedings under the 7 G. 2. c. 20. §§ 1. 2. upon payment of principal, interest, and costs, and it was referred to the master to ascertain what was due. The defendant Steel had agreed with Mr. Colqhuit, the owner in fee, for the purchase of the premises in question. He had paid part of the money before he discovered that there was an outstanding mortgage in Blagg, the lessor of the plaintiff. A Miss Vaughan had lent a sum of money to Colqhuit, and some time afterwards he mortgaged to her the premises in question, as a

[a] See 4 Chit. B. J. 608.

security. She assigned the mortgage to Blagg. The master, in ascertaining what was due, had taken into the account three sums amounting to 50*l.*, which the defendant contended he was not liable to pay. He referred to the words of the act, "That when any action of ejectment shall be brought by any mortgagee for the recovery of the possession of any mortgaged lands, &c. and no suit shall be then depending in any of his Majesty's Courts of Equity in England, for foreclosing or redeeming such mortgaged lands, if the person having right to redeem such mortgaged lands, and who shall appear and become defendant in such action, shall at any time pending such action, pay unto such mortgagee, or in case of his refusal, shall bring into Court where such action shall be depending, all the *principal monies and interest due on such mortgage*, and also *all such costs as have been expended in any suit or suits at law or in equity upon such mortgage* (such money for principal, interest, and costs, to be ascertained by the Court where such action is depending, or by the proper officer by such Court to be appointed for that purpose), the monies so paid to such mortgagee, or brought into such Court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the Court shall discharge such mortgagor from the same accordingly, and shall, by rule of the same Court, compel such mortgagee, at the costs of such mortgagor, to reconvey such mortgaged lands, and such estate and interest as such mortgagee hath therein, and deliver up all deeds, evidences, and writings in his custody relating to the title of such mortgaged lands, unto such mortgagor, who shall have paid such monies into the Court, or to such other person as he shall for that purpose appoint." The sums objected to were, first, a sum of 10*l.*, which was admitted to have been due to Miss Vaughan for interest before the mortgage was created; the second was a sum of 22*l.*, for preparing the mortgage; and the third was a sum of 18*l.*, for the expense of the assignment. He contended, that none of these sums ought to have been allowed, and that they were not contemplated by the act of parliament, and that the master was not correct in deciding that they came within the equity of the statute.

V. Richards shewed cause, in the first instance, and contended that those sums ought to be included. He said, that upon a bill to foreclose, he would clearly have been entitled to them. With respect to the 10*l.*, it was paid by Mr. Blagg to Miss Vaughan, and the master found it to be due; and he submitted, that the master's decision was final. Another objection was, that this was not a case within the act. There was here an absolute conveyance, in trust to sell; and he cited a decision of the Vice-Chancellor, not yet reported, that though in ordinary cases a party may tack, yet that upon such a deed as this, the party could not be allowed to tack; and that that Court had evidently considered it not to be a mortgage.

C. Cresswell, in reply, contended, that it was clearly a mortgage within the meaning of the act, as it was made to secure principal and interest. In modern mortgages, it was usual to introduce a power of sale, with or without the consent of the mortgagor. Where the object of the conveyance appears to be to secure a sum of money, the security is to be considered a mortgage. Though the sums in dispute are sworn to have been paid by Mr. Blagg to Miss Vaughan, yet he clearly could not have recovered the costs of the assignment as against the mortgagor, otherwise he would be liable to pay for any number of subsequent assignments, even to the extent of exhausting the whole value of the estate.

Taunton, J.—The rule must be made absolute. The deed is to be considered to all intents and purposes a mortgage within the meaning of the 7 G. 2. Though there is an absolute power to sell, the estate would be clearly redeemable, by paying the money due at any time before the mortgagee had actually executed his power of sale. The objections to the master's report are well founded. The 10*l.* was for by-gone interest, and it was not included in the mortgage, nor made part of the principal; it was therefore merely a collateral debt. The expenses allowed, are neither expenses at law nor in equity. If the mortgagor could be saddled with the expense of this assignment, he might be liable for an indefinite series of assignments.

Rule absolute, with costs.—*Doe* d. *Blagg* v. *Steel*. April 30th, 1832. K. B. P. C.

EJECTMENT.—SERVICE OF DECLARATION.—BANKRUPT.

A declaration in ejectment must be served upon the person in actual possession: and an affidavit, stating that a person is the "legal" tenant, is not sufficient.

V. Richards moved for judgment against the casual ejector, under these circumstances: The lessor of the plaintiff had granted a lease for years of the premises in question, which was assigned to a person who had become bankrupt. The assignee had been upon the premises, but had not actually taken to them, nor had he, or the bankrupt, given up the lease. The landlord was proceeding for a forfeiture for nonpayment of rent. At present, the premises were locked up, and no one actually in possession; but whether the bankrupt or assignee had locked them up, was not known. A declaration had been served upon the bankrupt, and another on the assignee, and one had been stuck upon the premises. The affidavit stated that the bankrupt or the assignee was in "legal" possession.

Taunton, J. was of opinion, that if the bankrupt had locked up the premises, he was in possession, though not bodily. He said it was usual to swear that some one was in actual possession; but the affidavit here was only argumentative: and desired the motion to be made again on an amended affidavit, stating that service had been made upon the bankrupt

and the assignee, they, or one of them, being in possession, and not in legal possession, as was now sworn.—*Doe* d. *Osbaldeston* v. *Roe*. Monday, April 30th, 1832. P. C.

JUDGMENT AS IN A CASE OF NONSUIT.

Where issue has been joined in one term, and no notice of trial given, the defendant cannot move for judgment as in case of a nonsuit, in the next term, notwithstanding R. 70. H. T. 2 W. 4.

Busby shewed cause against a rule for judgment as in case of a nonsuit. Issue was joined in Hilary term last. The plaintiff did not proceed to trial, nor did he give any notice of trial. The defendant, therefore, was too soon in his application.

Ball, in support of the rule, cited rule 70 of Hilary term, 2 W. 4, by which, it was directed, that "no entry of the issue shall be deemed necessary to entitle a defendant to move for judgment as in case of nonsuit, or to take the cause down to trial by proviso." Before this rule the practice was, as laid down by Mr. Tidd[a], "the defendant cannot move for judgment as in case of a nonsuit, in town causes, the next term after that in which issue was joined, although it was joined early enough to enable the plaintiff to give notice of trial for the sittings after the preceding term, the plaintiff in such case having the whole of the next term to enter the issue, and no laches can be imputed to him till the term after." Now, that the necessity for entering the issue was removed, the necessity for waiting the time, which the plaintiff had for entering it, was removed also. There was now no occasion to wait the intermediate term given to the plaintiff under the former practice.

Taunton, J.—All, I apprehend, which has been done by the new rule, is to remove the necessity of entering the issue. The practice in every other respect remains the same. Unless notice of trial has been given, you cannot move for judgment as in case of a nonsuit, in the next term.

Rule discharged, with costs.—*Gates* v. *Terry*, E. T. May 3d, 1832. K. B. P. C.

INTERPLEADER ACT.—SHERIFF.

Where the sheriff has levied under a fi. fa., *and while in possession he receives notice that other writs of execution have been issued against the defendant's goods, and that the first execution creditor is not intitled to the whole proceeds of the levy, the sheriff is not entitled to relief under* 1 & 2 *W.* 4. *c.* 58. § 6.

J. Jervis moved for a rule under the 1 & 2 W. 4. c. 58. § 6,[b] on the part of the Sheriff of Montgomeryshire, calling on certain persons to come before the Court to state their claims, in order that the Court might make such directions as should appear just, for the settlement of their respective demands. He applied on an affidavit, which stated, that a writ of *fi. fa.* had been delivered to him, which he had executed. While in possession, notice of several other writs having been sued out against the defendant's goods, and that the first execution creditor was not intitled to the whole amount levied, was given to him. Under these circumstances he applied for relief.

Taunton, J.—The writ will be a sufficient justification to him for paying over the proceeds of the levy to the first execution creditor. What signify these notices? That is merely struggling for priority of claim. The case is not within the statute.

Rule refused.—E. T. May 3d, 1832. K. B.

[a] 2 Prac. 764. ed. 9.
[b] 2 Dowling's Statutes, 571.

NOTES OF THE WEEK.

House of Lords.

CONTEMPTS IN ECCLESIASTICAL COURTS.—LUNATICS.—FINES AND RECOVERIES.—LIMITATION OF ACTIONS.—INHERITANCE.—CURTESY.

These bills are waiting for the second reading.

REMEDIES AGAINST THE HUNDRED.—ANATOMY.

These wait for Committees.

SENTENCE OF DEATH.—PUNISHMENT OF DEATH.

These wait for reports.

House of Commons.

STATUTE OF FRAUDS AMENDMENT.—ATTESTATION OF INSTRUMENTS.—TITHES' PRESCRIPTION.

These Bills wait for the second reading.

EXCHEQUER OFFICERS.—WITNESSES IN EQUITY.—PRESCRIPTION.

These Bills wait for Committees.

PRIVILEGES OF PARLIAMENT.

This Bill has been considered in Committee, and reported.

USURY.

The second reading deferred till the 9th of July.

DOWER.

Committee deferred.

BIRTHS' REGISTRATION.

Consideration of report deferred till the 6th of July.

SEWERS.

Report to be considered on the 11th of July.

SITTINGS IN THE (EQUITY) EXCHEQUER,

AFTER TRINITY TERM.

The General Sittings will be held at Gray's Inn Hall on Saturday the 30th instant, and the Lord Chief Baron will continue to sit in Equity from that day up to, and including Thursday the 12th of July.

The Court will sit at ten o'clock each day.

Saturday	June 30		Revenue Motions. Petitions. Equity Motions. Rudd *v.* Wright and other motions.
Monday	July 2		Freshfield *v.* Legh — Report & Exceptions by order. Six Causes.
Tuesday		3	Do.
Wednesday		4	General business.
Thursday		5	Causes.
Friday		6	Thompson *v.* Pennyman (by order), and other Causes.
Saturday		7	Do.
Monday		9	Do.
Tuesday		10	General business.
Wednesday		11	Do.
Thursday		12	Causes.

SEAL DAY, Friday the 20th July.

The office of the Accountant General of this Court is ordered to be closed on Friday the 20th of July (the Seal Day above mentioned), for the purpose of adjusting the accounts of the suitors of the Court with the books kept at the Bank of England, and to be re-opened on Friday the 2d day of November next, being the first day of Michaelmas term.

RECENT ORDERS AS TO COSTS IN THE (EQUITY) COURT OF EXCHEQUER.

WHEREAS it is expedient that the present practice of the Court with reference to costs in the cases after mentioned should be altered, it is therefore hereby ordered:

1. That if a party give notice of motion, and does not move accordingly, he shall, when no affidavit is filed, pay to the other side forty shillings costs, upon production of the notice of motion. But when an affidavit is filed by either party, the party giving such notice of motion and not moving, shall pay to the other side costs, to be taxed by the master, unless the Court itself shall direct, upon production of the notice of motion, what sum shall be paid for costs; and the motion of which notice has been so given, shall not be renewed till the costs of the former motion be paid.

2. That in all cases where stated costs are payable, on taxation of the costs of the cause, the costs necessarily and properly incurred by the proceeding shall be allowed, deducting therefrom the stated costs which may have been paid according to the course of the Court.

3. That in all cases where a *subpœna* for costs issues, such *subpœna* shall direct the costs to be paid to the parties, or to the bearer of the writ; and it shall not be necessary for the person serving the *subpœna* and making the demand of payment, to be authorized by power of attorney to make such demand.

That the foregoing orders shall take effect in all cases that may occur from and after the first day of Easter Term (1832).

ANSWERS TO QUERIES.

COMMON LAW.

ACTION ON BOND. P. 48, *antè*.

B. can undoubtedly maintain an action against the executors of *A.* for the recovery of the 200*l.* *Oswald* v. *Leigh*, 1 T. R. 270; *Moreland* v. *Bennett*, 1 Str. 652. The circumstance of more than twenty years having elapsed since the execution of the bond, only affords a *presumption* of payment; but that presumption is sufficiently rebutted by proof of payment of interest within that period. J. J. S.

EXECUTOR.—RESIDUE. P. 48, *antè*.

1. I refer your correspondents to 1 W. 4. c. 40. § 2, being "An act for making a better provision for the disposal of the undisposed-of residues of the effects of testators;" in which it is expressly enacted, "That where there is not any person who would be entitled to the testator's estate under the statute of distributions, in respect of any residue not expressly disposed of, nothing contained in such act shall affect or prejudice any right to which any executor, if this act had not been passed, would have been entitled;" thereby, undoubtedly shewing the executor is in this instance clearly entitled to the property.

As an old and attentive observer of the queries and answers contained in your much valued weekly miscellany, I would advise the careful watching of the present outpouring of fresh acts, in which will be found a vast number of the hitherto quoted dicta, utterly annihilated. H. H. P.

2. R. B. does not state whether the testator died before or after the 1st of September, 1830, the period at which the statute of 1 W. 4. c. 40. commenced its operation. J. B.

BEQUEST.—WIDOW. P. 79, *antè*.

The right of *C.*, *D.*, and *E.*, became absolutely vested upon the death of *A.*, subject to the life interest of *B.* Upon the death of *D.*, without issue, *and intestate*, his interest became divisible, under the statute of distributions, amongst his widow, and *C.*, and *E.*, (who, I infer, were the only next of kin), the widow taking one half, and *C.* and *E.* the other half equally between them. Upon *B.*'s death, therefore, *D.*'s widow will be entitled to one half of "what would have been her husband's share:" or if she be then dead, it will belong to *her* personal representative. J. B.

WILL AND CODICIL. P. 79, *antè*.

1. In answer to the case of the attestation of a will, see *Attorney-General* v. *Bernes*, 2 Vernon, 597. Gilb. C. B., p. 117, says, "And this requisite, of three witnesses to the will, is indispensable; nor will three to the codicil satisfy it; *nor three partitively*."

2. The question proposed seems to have been decided under expressly the same circumstances by the case of *Lea* v. *Libb*, 2 Mod. 263; and the Court there determined in the negative, upon the ground that there was no entire instrument attested by three witnesses.

A SUBSCRIBER.

TRESPASS. P. 80, *antè*.

The land of every owner or occupier is enclosed and set apart from that of his neighbours, either by a visible and tangible fence, as one field is separated from another by a hedge or wall, &c., or by an invisible boundary, existing only in the contemplation of law, as when the land of one man joins to that of another in the same open or common field. Hence every unwarrantable entry upon the land of another is termed a trespass by breaking his close. Where two adjacent fields are separated by a hedge and ditch, the hedge *primâ facie* belongs to the owner of the field in which the ditch is not. If there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership. Per *Bayley*, J. in *Guy* v. *West*, Somerset Summer Assize, 1808.

In the case put by your correspondent M., it does not appear through whose negligence the damage complained of was occasioned, inasmuch as the querist has not stated whose duty it was to have kept up the fence. If it devolved upon *A*, certainly he will be liable to an action for trespass. It is quite clear that no proceedings whatever can be taken against *B*. See Selwyn's Nisi Prius, tit. Tres.

H. B. A.

LAW OF PROPERTY AND CONVEYANCING.

ANNUITY.—INROLMENT. P. 63, *antè*.

It would certainly appear, from the cases in 4 T. R. 790 & 792, and 7 E. R. 529, that the deed need not be enrolled: but the question, as to the necessity of a lease for a year, must depend upon the nature of the security, which, if a conveyance in trust, or to uses, must, it is presumed, be founded upon that instrument.

A SUBSCRIBER.

LAW OF ATTORNEYS.

SOLICITOR.—LIEN. P. 96, *antè*.

An attorney has a lien on the money recovered by him for the use of his client, and he may retain it, to the amount of his bill, for any description of professional business which he might previously have transacted for his client; and he may stop it *in transitu*, if he can lay hold of it, and his client would get no relief by an application to the Court, as they would prevent its being paid over until his demand (provided it be a just one) be satisfied. See Tidd's Practice, v. 1. p. 339, and the cases cited therein. See more, as to the lien of attorneys on deeds, securities, &c. in the Monthly Record for May, p. 211. H. B. A.

QUERIES.

LAW OF PROPERTY AND CONVEYANCING.

LEASE FOR YEAR.

Lease and release dated in 1818, executed by all parties, conveying property in Middle-

sex. Release properly registered. The premises were again conveyed by lease and release in 1823, and again in 1830, when the purchaser required the lease for a year of 1818 to be registered. The vendor of 1818 immediately signed the lease for that purpose, and then struck out the original signature with his pen, leaving the seal perfect. Is the lease cancelled? and if so, does it affect the title? W. P.

LAW OF LANDLORD AND TENANT.

RENT.—BANKRUPT.

A. lets to *B.*, for the term of one year, certain premises, from 1st Jan. 1829, rent payable 1st July and 31st Dec. same year. *B.* enters, and on 14th June, before any rent is actually due, becomes bankrupt. The assignees give up the premises to *A.* *B.* afterwards obtains his certificate. How is *A.* to obtain his rent, or any part of it? Can he prove under the commission for the five months and a half, the rent not being due? Or has he any remedy against *B.*, now that *B.* has got his certificate? or any against the assignees? H. A. W.

COMMON LAW.

PATENT.—CONTRACT.—SUNDAY.

A. having a patent for a weaving machine, assigned the exclusive right to use and vend the same to *B.*; the latter did not, however, manufacture the machines, but contracted with other persons, who for the right to use and vend the machines, engaged to pay *B.* not less than 50*l.* a year, whether they effected any sales, or not. *B.* (amongst others) entered into one of these contracts with *C.*, a stranger, on a Sunday, and such contract was filled up and signed by both parties on that day, and the whole terms of it were agreed upon in the presence of *D.*, who witnessed it. *C.* then paid *B.*, in part of the 50*l.*, the sum of 10*l.*; such agreement, however, bore date of the Saturday. Is such a contract valid?

T. D.

MISCELLANEA.

"HANGED FOR LEAVING HIS LIQUOR."

For this, the most unsuspected crime imaginable, the truly unfortunate man, who gave rise to the adage, suffered the sentence of the law at York. He was a saddler at Bawtry, and occasioned this saying, often applied among the lower people to a man who quits his friends too early, and will not stay to finish his bottle, "that he will be hanged for leaving his liquor, like the saddler of Bawtry." The case (according to Pegge's Curialia Miscellanea) was this: There was formerly, and indeed it has not long been suppressed, an ale-house called "The Gallows House," situate between the city of York, and their Tyburne, at which house the cart used always to stop; and there the convict and the other parties were refreshed with liquors; but the rash and precipitate saddler, under sentence, and on his road to the fatal tree, refused this little regale, and hastened on to the place of execution—when, very soon after he was turned off, a reprieve arrived; insomuch that, had he stopped, as was usual, at the Gallows House, the time consumed there would have been the means of saving his life; so that he was hanged, as truly as unhappily, for "leaving his liquor."

The same compliment was anciently paid to convicts, on their passage to Tyburne, at St. Giles's Hospital; for we are told by Stowe (2 Hist. London, 74) that they were there presented with a bowl of ale, called *St. Giles's Bowl*, "thereof to drink at their pleasure, as their last refreshing in this life."

The Legal Observer.

VOL. IV. SATURDAY, JULY 7, 1832. No. XC.

> ——— "Quod magis ad NOS
> Pertinet, et nescire malum est, agitamus."
> HORAT.

CHANGES IN THE LAW DURING THE PRESENT SESSION OF PARLIAMENT, 1831—1832.

No. II.

THE REFORM ACT, 2 W. 4. c. 45.

IT now becomes our duty to state the principal alterations effected by the great measure which has been so long the subject of public attention. During its progress we advisedly abstained from offering an opinion upon it; but the battle has now been fought and won: the Reform *Bill* is now the Reform *Act*, and it is proper for us, as lawyers, to state briefly its practical effect. Many of its sections, although of the greatest importance, are mere positive enactments, affecting particular boroughs and districts, giving and taking away members—all which are so well known, and have been so repeatedly before the public, that we shall only allude to them here. Thus, those "words of fear" sections 1 and 2, and schedules A. and B., either completely take away, or lessen by one half, the right of sending members from the towns therein mentioned; and by sections 3 and 4, and schedules C. and D., the right of returning two members is given to the places mentioned in the former, and one member to those mentioned in the latter. Sections 5 to 10 are even more local, and relate entirely to particular places, which may be seen by a reference to the act. Section 11 relates to the proper returning officer for the boroughs in schedules C. and D. Section 12 gives six members to Yorkshire, instead of four, and divides it into three divisions, to return two members each. Section 13 gives four members to Lincolnshire instead of two, and divides it into two divisions, to return two members each; and sec. 15, and schedule F. give three members, instead of two, to Berkshire, Buckinghamshire, Cambridgeshire, Dorsetshire, Herefordshire, Hertfordshire, and Oxfordshire; and two members, instead of one, to Carmarthenshire, Denbighshire, and Glamorganshire. By section 14, each of the counties mentioned in schedule F. is divided into two divisions, each division to return two members.

By sec. 16 it is enacted, that the Isle of Wight shall return one member, as if it were a county; and by sections 17, 18, and 31, and schedule G, provision is made for the return of members for the towns which are counties of themselves.

We have now disposed of those sections of the bill which relate to particular parts of the kingdom; and we shall proceed to state the clauses by which some most important alterations are made in the previously existing law: and

FIRST, *As to the extension of the right of voting.*—By sec. 19, every male person of full age, and not subject to any legal incapacity [a], who shall be seised at law or in

[a] In an edition of the act, just published by Mr. Cockburn, p. 12, the persons incapacitated from voting are thus enumerated:—Aliens, persons under age, women, idiots and lunatics (except during lucid intervals); persons outlawed on criminal process; persons convicted of felony (until the sentence of the law has been suffered, which operates as a pardon); but persons convicted of bribery or forgery are disqualified for ever, 2 G. 2, c. 24, § 6; persons having received parish relief within twelve calendar months before the time of registration, 2 W. 4, c. 45, s. 36; peers, except Irish peers, when members of parliament for any county or town in England; officers of the ex-

equity, of any lands or tenements, of copyhold or any other tenure, except freehold, for his own life, or *pur auter vie*, or any larger estate, of the clear yearly value of 10*l.*, shall be entitled to vote for the members of the county in which such land shall be situate, provided (sec. 25) that they are not situate in a borough, and entitle him to a vote for the same.

By sec. 20, every male person, of full age, and not subject to any legal incapacity, who shall be entitled, either as lessee or assignee, to any lands or tenements, for the unexpired residue, whatever it may be, of any term originally created for a period of not less than sixty years, of the clear yearly value of 10*l.*; or for the unexpired residue, whatever it may be, of any term originally created for a period not less than twenty years, of the clear yearly value of 50*l.*; or who shall occupy as tenant any lands or tenements for which he shall be liable to a yearly rent of not less than 50*l.*, shall be entitled to vote for a member of the county in which such lands shall be situate; but the sub-lessee, or the assignee of any underlease, shall not vote, in respect of any term of sixty or twenty years, unless he shall be in the actual occupation of the premises; and it is further provided, that no person shall vote for a county, if his lands entitle him to vote for a borough. Thus, copyholders and leaseholders, who, before the act, had no right of voting for counties, may now vote, with the qualifications above-mentioned. The rights of freehold voters are somewhat restricted. Thus, before the passing of the act, any person seised of a freehold estate of the clear yearly value of 40*s.*, could vote for a county; but by sec. 18, if he only holds his estate for his own life, or the life of another, except he shall be in the actual possession of the lands, or except the same shall have come to such person by marriage, marriage settlement, devise, or promotion to any benefice or office, or except the same shall be of 10*l.* yearly value, he shall not have a vote; with a saving of existing freehold votes, so long as the present voters shall continue seised thereof.

By sec. 27, it is enacted, that in every borough returning a member, every male person who shall occupy, within such borough, any house, &c. of the clear yearly value of 10*l.*, shall be entitled to vote, if he has occupied the premises for twelve calendar months next previous to the last day of July in such year, and if he shall have been rated to the poor's rates, and shall have paid them and the assessed taxes, and shall have resided [b] in the borough for six calendar months next previous to such last day of July, or within seven miles thereof; but (s. 28) if the premises are of sufficient value, they need not be the same premises, but may be different premises, occupied in succession.

By sec. 29, it is enacted, that joint occupiers of houses, &c. in boroughs, shall be entitled to vote, in case the clear yearly value of the premises shall be of an amount which, when divided by the number of such occupiers, shall give a sum of not less than 10*l.* for every such occupier.

By sec. 21, no public or parliamentary tax, nor any church rate, county rate, or parochial rate, shall be considered charges upon the value of the lands; and (sec. 22) county voters need not be assessed to the land tax, which was necessary before the passing of this act.

By sec. 23, no person is allowed to vote by reason of any trust or mortgage estate, unless he shall be in the actual possession thereof; otherwise the mortgagor or *cestui que trust* may vote for the same. This is in conformity with the prior enactment of the 7 & 8 W. & M. c. 25, § 7.

By sec. 24, no person shall be entitled to vote for a county, for his interest as a freeholder in any house, &c. *occupied by himself*, if he is thereby entitled to vote for any city or borough, whether or not he shall have acquired the right to vote for such borough; and by sec. 25, no person shall be entitled to vote for a county for his interest as a copyholder or leaseholder in any house, &c. if he is thereby entitled to vote for any city or borough, whether or not he shall have acquired the right to vote for such borough.

It will be seen that an important distinction is made where the property is freehold, and where copyhold or leasehold. With respect to freeholds, the right of voting is taken away only when the owner *himself* occupies the property; but in copyholds or leaseholds, if either the owner or occupier

cise, customs, stamps, post-office or post office packets, and collectors of salt duties, 22 G. 3, c 41; persons on the establishment of the Metropolitan Police, 3 G. 4. c. 55, § 14, and 10 G. 4, cc. 44 & 45.

[b] Residence has been generally held to mean where a person's dwelling-place is, and more particularly where he retires to sleep, 2 Inst. 122. *Rex* v. *Mildenhall*, 3 B. & Ald. 374. Occasional absence, if the voter had a *bonâ fide* intention of returning, would not, it would seem, vitiate his vote. See *Rex* v. *Mitchell*, 10 East, 511. *Wootton Bassett case*, Rog. 161.

can vote for the borough, it is sufficient to take away the vote for the county. Where the property is freehold, there may, therefore, be two votes—one by the person entitled to the freehold, and the other by his lessee.

[*To be concluded in our next.*]

ABSTRACT OF THE FOURTH REPORT OF THE COMMON LAW COMMISSIONERS.

FINAL PROCESS.

In our last number we gave an abstract of the propositions of the Commissioners with respect to imprisonment for debt *before judgment*. We now add their recommendations as to final process.

They consider that the law is defective—1st, In not making all the debtor's property directly liable to the execution of the judgment creditor.

2, In making an arrest of the person to operate not merely as a means of procuring satisfaction from the debtor's property, but as a discharge of the debt; except when the debtor lies in prison.

3rd, In making the imprisonment a condition precedent to the personal discharge of a debtor who surrenders his property without fraud.

4th, In not compelling the debtor to surrender his property where he is in custody, and in not providing means for making all his property available when he absconds.

They therefore propose, that all property now distributable under the Bankrupt and Insolvent Acts, shall be liable to satisfy the claims of the judgment creditors.

That the imprisonment of the debtor should in no case preclude the creditor from proceeding to take the property of the debtor in execution.

But that no debtor should be liable to personal arrest and imprisonment in execution, provided he forthwith give security for making an immediate cession of his property for the benefit of his creditors, and for conforming in all respects with the insolvent law. In order, however, to prevent fraud, the creditors should be at liberty, as well before as after judgment, by a Judge's order under special circumstances, or upon an affidavit of belief that the debtor intended to delay the creditor by absconding, to arrest his person.

In order to compel a discovery of the debtor's property, it is proposed, that he should be liable to a criminal prosecution in the following cases:

1st, Where he has obtained credit by means of false pretences.

2nd, Where he has aliened or concealed property, after notice of suit, to a certain amount, with intent to prevent satisfaction of the debt; and when the offence has been committed after judgment, to be visited with severe penalties.

3rd, Where any debtor has, after judgment, wilfully secreted or absented himself, to avoid legal process.

4th, Where, after entering into recognizance for cession of property, the debtor has embezzled, &c.

ON THE COURTS OF JUSTICE IN AMERICA.

In estimating the value of the changes and reforms which are in progress in this country, it is of the greatest importance that we should look at the judicial institutions and modes of legal procedure in other countries. We have from time to time laid before our readers information of this kind, and propose now to continue the series.

The work of Mr. Vigne[a], a barrister, enables us to do this very satisfactorily. During his "Six Months in America," he has actively collected a large mass of information, and, as might be expected from his professional habits, he has particularly turned his attention to the mode of administering justice in America. We shall reserve for a future occasion, his statements with respect to the Criminal Code, and for the present confine ourselves to the description of the several Courts of Justice, and the nature of the suits and proceedings adopted therein. We make our selections from various parts of Mr. Vigne's work, omitting those portions which are of a political kind.

"The United States are divided into seven judicial circuits, and thirty-two judicial districts. Each state is one district, with the exceptions of New York, Pennsylvania, Virginia, Tennessee, Louisiana, and Alabama; which are each of them divided into two districts. There are three courts belonging to the general or federal government: the District Court, the Circuit Court, and the Supreme Court. The District Court possesses a civil and crimi-

[a] "Six Months in America." By Godfrey T. Vigne, Esq., of Lincoln's Inn, Barrister at Law. Whittaker.

nal admiralty and maritime jurisdiction, and also takes cognizance of all cases affecting the revenue, and all crimes and offences committed within the district, which are punishable by moderate corporal punishment, or fine and imprisonment. It is held by a District Judge (there being one in each district), sitting alone, four times a year: his salary varies from 1000 to 3000 dollars a year. An appeal lies from his decision in cases where, exclusive of costs, the matter in dispute exceeds the sum or value of fifty dollars, to the "Circuit Court," possessing an original jurisdiction, civil and criminal. The civil jurisdiction extends to all controversies between citizens of different states, and between a citizen and an alien. All offences against the penal laws of the United States, can be tried in this court. It is also a court of equity. The Circuit Court is held before the District Judge, sitting twice a year with the Judge of the Supreme Court. An appeal lies from its decisions to the Supreme Court of the United States, where the matter in dispute exceeds 2000 dollars. In criminal cases, a point may be reserved for the opinion of the Judges of the Supreme Court, which is sent down to the Circuit Court to be proceeded upon afterwards. In six of the states, Alabama, Mississippi, Louisiana, Indiana, Illinois, and Missouri, there is no Circuit Court, because the Judges of the Supreme Court could not find time to sit there twice a year; but the District Courts possess the powers and jurisdiction of a Circuit Court.

"The Supreme Court of the United States is a very high and honourable tribunal, composed of a chief justice, with a salary of 5000 dollars (1125*l.*), and six associate justices, with a salary of 4500 dollars each, who hold a sitting once a year, at Washington, commencing on the second Monday in January. The court sits five hours every day for two months, deciding in that time usually about eighty causes, which are reported as those of the law courts in England used, and ought still to be, by an officer of the court. Its original jurisdiction is confined to all such cases, affecting ambassadors, consuls, and vice-consuls, as a court of law can exercise consistently with the law of nations; and it has original, but not exclusive jurisdiction of all suits brought by ambassadors, and other public ministers, in which a consul or vice-consul is a party. But its dignity rests chiefly on its appellate jurisdiction, which extends to all cases and appeals, and writs of error from the Circuit Courts: likewise in all cases where the constitution and laws of the federal government, or the construction of any treaty entered into by the federal government, or its validity, or any right or interest under a treaty, has been a subject of controversy in the state tribunals. Its decisions and opinions on the construction of the constitution, are the safeguard of the Union. But its appellate jurisdiction is defined, and extends to no cases but where the power is affirmatively given. In order to enable it to issue a *mandamus*, proof is required that it is an exercise, or necessary to an exercise, of its appellate jurisdiction. The Supreme Court has jurisdiction in all controversies where the United States shall be a party; in controversies between two or more states; between a state and the citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state, or the citizens thereof, and foreign states, citizens, or subjects. A strict and admirable attention to justice is observable in these arrangements. Every description of case which might be partially decided by the courts of the litigant states, is brought to the bar of the great national tribunal to be disposed of.

"All the Judges in the American courts enjoy an immunity from wigs, and the Judges of the Supreme Court alone are clothed in "silk attire." Their robes are black, and fashioned according to the taste of the wearer. I examined four or five of them which were hanging up in the court, and found that although perfectly judicial, they displayed no small attention to taste in their cut and general appearance. A proper degree of dignity is required and observed in the Supreme Court; business is there conducted as it ought to be in every court of justice; but some of the state courts are remarkably deficient in this respect: even in the Court-house at Philadelphia, during the sitting of the Circuit Court, I have seen a gentleman, a counsellor of eminence, coolly seat himself on the table whilst a judgment was being given, and in that attitude I have heard him address some interlocutory observations to the Court, and press them upon its attention with great earnestness and ability. I cannot understand why more dignity, both judicial and forensic, should not be observed in the courts of the United States. I have often been in the company of American lawyers, who, as individuals, were men of gentlemanly manners, and excellent general information, which they have ever evinced a readiness to impart; but I do not remember one who ever mentioned the subject at all, without admitting that a proper want of the respect due to the time and the place is frequently but too visible in the American courts; and yet there is no improvement.

"Silence, being indispensable, is well preserved; but counsel and attorneys may be occasionally seen with their legs dangling over the back of a chair, or possibly resting on the table. A corresponding carelessness of manner is of course exhibited by the spectators. I have even observed persons with their hats on in court, and upon inquiry have been told they were Quakers; but once or twice I remember having taken the liberty of doubting the information. I hope I shall not be supposed to mean, that no greater decorum is observed in the principal courts of the larger cities than in those held at places of minor importance; I am speaking of them generally, as I found them when in travelling. I happened to arrive at some place where a court was sitting, and "just dropped in" for half an hour *en passant*; but still there is always a something even in the best of them, which, to an English eye, ap-

pears undignified and indecorous; although there can be no doubt that their appearance is not mended by the total absence of wigs and gowns from all of them.

"The spirit of equality renders it allowable, and the impossibility in distant towns of making the profession answer by any other arrangement, renders it necessary, that a barrister and solicitor should frequently commence business as partners, and play into each other's hands. A Judge will frequently travel from town to town unattended, in his gig, or on horseback, with his saddle-bags before him, or in the stage-coach, and dine at the village table d'hôte with shopkeepers, pseudo majors, and advertising attorneys." * * *

"When it is considered that the Supreme Court has a federal jurisdiction extending over a union of twenty-four states, many of them as large or larger than England, whose humble and individual importance are increasing, and which are divided and subdivided by party, and by conflicting and annually arising interests, and which are becoming more and more democratic in every succeeding year, and consequently more and more opposed to the spirit in which the constitution was originally framed, some idea may be formed of the importance that is attached to the decisions of this court, whose authorities, from first to last, are intended as a safeguard to the Union. The independence of this court, and, in fact, of all the federal judiciary, may be termed the sheet anchor of the United States. Its power constitutes their chief hope; the abuse of it is the only medium of tyranny, and is therefore the principal source of apprehension. The Judges of all the federal courts hold their offices during good behaviour, and are removable only by impeachment. It would reasonably be supposed that the individual states would follow the example of the general government in the appointment of their Judges; but this is not the case. In seven of the states they are elected for a term of years only; in Rhode-Island they are elected annually; in five of the states they are obliged to go out of office at sixty, sixty-five, or seventy years of age. This law in the enlightened state of New York has deprived it of the valuable services of Chancellor Kent, the author of the admirable Commentaries on the Laws of America. There are many democrats who actually wish that the Judges of the Supreme Court should be elected for a term of years only. This custom is notoriously productive of sufficient hardships in some of the more remote states, where, on account of the smallness of the salary, amounting to not more than two or three hundred pounds, the bench is sometimes filled by young and inexperienced men, who are the children of party, and whose decisions must be occasionally affected by the hope of re-election." * * *

"The proceedings of the courts of equity are for the most part similar to those practised in England. Many of the states have Chancellors, whose offices are held like those of the other Judges. The state of New York had just been obliged to appoint a Vice-Chancellor, on account of the increase of business. The duties of the Chancellor, as far as they go, are the same as those of the Lord Chancellor of England; but in many of the states the jurisdiction in bankruptcy or insolvency is separate." * * *

"The proceedings in a Chancery suit, differ only in the pleadings being a little more simple: a bill, for instance, contains merely the stating and interrogating parts, and the prayer. Witnesses are examined, as in England, upon written interrogatories. The effect of an answer and the mode of using it in court, are also similar.

"There is no such officer as an accountant-general. Masters in Chancery are known only in some of the states. Their duties are somewhat similar; and matters are referred to any one of them whom the parties may agree upon. In New York, I observed that 'Mr. A. Master in Chancery,' was almost as frequently to be seen on the door, as the names of a counsellor and solicitor. In those states where there are no Masters in Chancery, the court has a 'Permanent Auditor,' who discharges nearly all the duties assigned to the Masters in England.

"The form of an action, the pleadings, and the method of obtaining evidence, are essentially the same as those used in England, generally. In some states the action of ejectment is unknown; in others, it has merely undergone some modification. Real actions, such as writs of right, writs of entry, are much used; the period of limitation has, however, been altered from that of England. The English law of prescription is acknowledged, with a very few necessarily constitutional exceptions. The period of limitation allowed in an action of assumpsit, also varies in different states; in some it is three years, in others it is six, as in England. Where the action of ejectment is in use, the period of limitation is in some states twenty years, as in England; in others, seven years is thought sufficient.

"Juries are generally constituted as in England, with the exception of special juries, which are never formed.

"Throughout the United States a counsellor is allowed to make a speech for the prisoner, and act generally in his behalf, as in a civil cause.

"Every state in the Union has its rules for the admission of counsellors, solicitors, and attorneys. They generally require that a student shall have studied law with some counsellor for at least three years. On application for an admission as an attorney, the court usually appoints three gentlemen of the bar to examine into the moral and legal qualifications of the applicant. If he be previously and favourably known to them, the examination is almost nominal. If he be unknown, or be known, but with unfavourable impressions, the examination is proportionably more strict. When admitted as either counsellor or solicitor, he can generally practise in both characters, the distinction being nominal, excepting in the Supreme Court of the United States, where no person can be counsellor and solicitor at the same time. In

the country particularly, it is usual for a lawyer to assume the duties of attorney, conveyancer, proctor, solicitor, and counsellor; but after having practised some time, he usually confines himself to the practice of a counsellor only. A barrister and solicitor are frequently partners: as I have before remarked, it would be impossible for any practitioner to obtain a livelihood, excepting in the larger towns, without exercising his abilities in both capacities. For the 'materiel' of a great part of the foregoing remarks I am indebted to the kind and able assistance of a gentleman of the Baltimore bar, and I have endeavoured that their accuracy should not suffer under my pen."

We shall take an early opportunity to consider the details of the various parts of the Laws of the several United States which bear upon the alterations contemplated in this country.

UNIFORMITY OF PROCESS ACT.

No. II.

We now continue our remarks on the above Act. In our last we pointed out the changes effected by the first section of the act. That only provided for the issue of process. Sec. 2 points out the mode of appearing, and gives a form in the schedule for that purpose; whether the appearance is by the defendant in person, or by attorney, or the plaintiff appears for him under the implied authority granted by the form of summons.

The third section provides, "that in case it shall be made appear by affidavit, to the satisfaction of the Court out of which the process issued, or, in vacation, of any Judge of either of the said Courts, that any defendant has not been personally served with any such writ of summons as hereinafter mentioned, *and has not, according to the exigency thereof, appeared to the action, and cannot be compelled so to do without some more efficacious process*, then, and in any such case, it shall be lawful for such Court or Judge to order a writ of *distringas* to be issued, directed to the sheriff of the county wherein the dwelling-house or place of abode of such defendant shall be situate, or to the sheriff of any other county, or to any other officer to be named by such Court or Judge, in order to compel the appearance of such defendant; which writ of *distringas* shall be in the form, and with the notice subscribed thereto, mentioned in the schedule to this act, marked No. 3; which writ of *distringas* and notice, or a copy thereof, shall be served on such defendant, if he can be met with, or if not, shall be left at the place where such *distringas* shall be executed; and a true copy of every such writ and notice shall be delivered, together therewith, to the sheriff or other officer to whom such writ shall be directed; and every such writ shall be made returnable on some day in term, not being less than fifteen days after the *teste* thereof, and shall bear *teste* on the day of the issuing thereof, whether in term or in vacation; and if such writ of *distringas* shall be returned *non est inventus* and *nulla bona*, and the party suing out such writ shall not intend to proceed to outlawry or waiver, according to the authority hereinafter given, and any defendant against whom such writ of *distringas* issued shall not appear at or within eight days inclusive after the return thereof, and it shall be made appear by affidavit, to the satisfaction of the Court out of which such writ of *distringas* issued, or, in vacation, of any Judge of either of the said Courts, that due and proper means were taken and used to serve and execute such writ of *distringas*, it shall be lawful for such Court or Judge to authorize the party suing out such writ to enter an appearance of such defendant, and to proceed thereon to judgment and execution."

It will be observed, that there is an unnecessary provision introduced at the commencement of this section, and is contained in the words marked in italics. If the form, in the schedule attached to § 1, which implies, that the plaintiff may appear for the defendant at the expiration of eight days from the service of the writ, be of any force, the plaintiff may appear for the defendant, and proceed to judgment and execution accordingly, without being obliged to have recourse to the process by *distringas*, pointed out by this section. This power must be presumed to be possessed by the plaintiff, or the notice at the bottom of the form of summons, is only a form of so many idle words. This it cannot be conceived to be; and therefore, the cases to which the operation of this section should be applied ought to be those in which a personal service cannot be effected. Again, if the words of the section are construed as they stand, something like absurdity exists; for the first part of the section supposes cases in which "any defendant has not been personally served with any such writ of summons," "and has not appeared to the action;" and that then the process by *distringas* is to be adopted. Yet how can it be expected that a defendant should appear to an action in which he has not been served

with process? But if, according to our original suggestion, the whole passage in italics is struck out, as unnecessary, the section will be consistent, and the power of appearance by the plaintiff for the defendant, given by the form of summons, will be confirmed, and the extraordinary remedy of *distringas* confined to cases where the defendant cannot be personally served.

Every such writ is to be made returnable on some day in term. In this it differs from the writ of summons, which is not necessarily made returnable in term time, but is to be in force, by § 10, for four calendar months from the day of the date of it, including the day of such date.

The fourth section contains provisions for those cases in which it is sought to hold defendants to bail. It enacts, "that in all such actions wherein it shall be intended to arrest and hold any person to special bail, who may not be in the custody of the marshal of the Marshalsea of the Court of King's Bench, or of the warden of the Fleet Prison, the process shall be by writ of *capias*, according to the form contained in the said schedule and marked No. 4, and so many copies of such process, together with every memorandum or notice subscribed thereto and all indorsements thereon, as there may be persons intended to be arrested thereon or served therewith, shall be delivered therewith to the sheriff or other officer or person to whom the same may be directed, or who may have the execution and return thereof, and who shall upon or forthwith after the execution of such process, cause one such copy to be delivered to every person upon whom such process shall be executed by him, whether by service or arrest, and shall indorse on such writ the true day of the execution thereof, whether by service or arrest; and if any defendant be taken or charged in custody upon any such process, and imprisoned for want of sureties for his appearance thereto, the plaintiff in such process may before the end of the next term after the detainer or arrest of such defendant, declare against such defendant, and proceed thereon in the manner and according to the directions contained in a certain act of parliament made in the fourth and fifth years of the reign of King William and Queen Mary, intituled *An Act for delivering Declarations against Prisoners:* Provided always, that it shall be lawful for the plaintiff or his attorney to order the sheriff or other officer or person to whom such writ shall be directed, to arrest one or more only of the defendants therein named, and to serve a copy thereof on one or more of the others, which order shall be duly obeyed by such sheriff or other officer or person, and such service shall be of the same force and effect as the service of the writ of summons hereinbefore mentioned, and no other."

This section, it will be seen, refers to a form in the schedule. By that form the defendant is required to take notice that within eight days after the execution of the writ on him, inclusive of the day of such execution, he should cause special bail to be put in for him. Here a similar difficulty will arise in calculating the eight days, which was pointed out with respect to the summons, in our last number. A similar remark may be made with respect to the calculation of time in case of the *distringas*, under sec. 3. In the instance of the *capias* some difference may, perhaps, be made by the Judges, in the rules formed by them, in country and town causes. Attached to this form of *capias* is a warning to the defendant, stating what steps may be taken by the plaintiff in case the defendant shall go to prison for want of bail, or deposit, according to 7 & 8 G. 4. c. 71, or in case he should not enter an appearance. It does not clearly appear from the language of the section, whether a plaintiff need put the names of all the defendants to be arrested or served into each of the copies of process contemplated by the section. The proviso contained in this section will be of great advantage to plaintiffs. Formerly, where bailable process issued against two defendants, and one of them absconded or kept out of the way, the plaintiff was obliged to proceed to outlawry against him, before he could go on against the other. Now that the plaintiff may order the sheriff to arrest one only, and serve the other, the plaintiff may easily obtain judgment against both, without being driven to the expensive and dilatory process of outlawry.

SELECTIONS FROM CORRESPONDENCE.

No. VIII.

ARTICLED CLERKS.

We have received an epistle from a young gentleman, who is desirous of more leisure to read books, than it seems the practice of the office in which he is articled permits him to enjoy. We fear, from the terms in which he has couched his complaint, that he has insisted upon his supposed rights, in a manner

not very likely to ensure success, unless the claim were most indisputable. It is no business of ours to defend the practice complained of, if such really be the practice; nor shall we dispute the probability of there being some instances in which it prevails. We believe, however, that in most offices there is a very proper anxiety to do justice to the pupil, as well for the credit of the principals, as the obligations they owe. We do not agree with our correspondent, that a few hours each day of actual practice will fit him for the arduous duties of his profession, and that he may pass the rest in learned leisure. He must agree to bestow his labor heartily, or he will never rise to eminence; and let him recollect, that diligence never goes without its reward. The time will come, when he will feel the importance of habits of application, in the performance of duties however irksome.

We offer these hints, which are suggested to us by one who has had long experience in such matters; and we trust they will be received with the good feeling by which they are dictated.

FILING AFFIDAVIT OF DEBT.

There appears some mistake in the report of the case of *Wood* v. *Stone*, (p. 123, *ante*) on this subject. It is hardly possible, that a bailable bill of Middlesex should be issued, without an affidavit of debt being filed at the office where that writ is issued. Supposing the affidavit to have been filed, the common course certainly is to take an office copy of the affidavit, and file it at the King's Bench office, upon issuing a *latitat*; but the clerk in the latter office is of opinion, that the office copy is insufficient, and that an original affidavit should be filed with him also. The practice, as to office copies, is not, I believe, laid down in any of the books; but I think there has been a decision, which has thrown a doubt upon the sufficiency of the office copy. At all events, the filing an original affidavit upon issuing the *latitat*, even where a bill of Middlesex has been actually issued, seems sufficient to warrant the *latitat*. Every *latitat* presupposes a bill of Middlesex previously issued, although it is never actually issued but where the defendant is presumed to reside in that county. It will not, therefore, be contended, that a *latitat* is not a good commencement of an action, without a bill of Middlesex. If it is so, then the bill of Middlesex was void, for want of an affidavit of debt; but the issuing the bill of Middlesex being unnecessary to ground the *latitat*, the latter was good of itself, because the affidavit was filed at the King's Bench Office. J. N.

BANKRUPT LISTS.

Sir,

As the publication called "The Law Advertiser" terminated with the last year, which was valuable to the country practitioner, as it contained a full description of all bankrupts, and enabled him to make affidavits for the proof of debts, where the bankrupt resided at a distance, and where the Gazette is difficult to procure, I beg to suggest, as a subscriber to your valuable publications, that the insertion of a full description of the bankrupts, in the publication called THE MONTHLY RECORD, would considerably increase its value, and render it of greater service to the profession.

A SUBSCRIBER.

[We shall be glad to receive the opinions of our subscribers on the alteration here suggested; but if it were adopted, we think that the additional space it would require, ought to be gained by excluding some other of the lists—either the insolvents or the partnerships: we think the latter.]

REVIEW.

A Treatise on the Law of Executors and Administrators. By Edward Vaughan Williams, of Lincoln's Inn, Esq. Barrister at Law. In 2 vols. Saunders and Benning, 1832.

A GOOD work on the Law of Executors was much wanted. Every practitioner has almost daily use for such an one; and the very numerous cases already decided, and which are constantly increasing, needed a careful and accurate classification. The only modern work on the subject is that of Sir Samuel Toller, very able and useful at the time it was published; but it has been indifferently edited since his death, and is now in many respects imperfect. Under these circumstances, there was every reason for bringing out a new work on the subject.

Mr. Vaughan Williams is already known to the profession by his edition (in conjunction with Mr. Justice Patteson), of his father, Mr. Serjeant Williams's Notes to Saunders's Reports. He has, in the present work, undertaken a much more laborious and arduous service, of which we shall now give a short account. Mr. Williams follows, in general, the arrangement of Toller, except that he calls the 'books,' 'parts;' the 'chapters,' 'books;' and the 'chapters,' 'sections;' and enlarges the third book into three parts. He extends his enquiries into many subjects, either wholly untouched by his predecessor, or not sufficiently dwelt upon. Thus, in stating the duties of an executor with respect to legacies, he enters fully into the law of legacies, and occupies nearly 200 pages in the enquiry, to which Toller barely gives 50. In this we prefer the work of Mr. Williams, and it makes his treatise much more complete and

satisfactory. Great care has evidently been bestowed in the compilation of the work: the author rarely attempts to do more than to state the result of the decisions; he does not venture upon any disquisition of his own, but contents himself with stating the cases, and leaving the reader to make the application.

The merits of practical and extensive works of this nature can only be fully determined by time and frequent use. A work on an important branch of the law, stating or referring to many hundreds of cases, and embracing the consideration of as many different points, cannot be skimmed over like a work on history or biography; it cannot be read as Mrs. Kitty is willing to read Shakspeare, "on some rainy afternoon;" neither can it be estimated by extracts: for the law-reviewer is in general unfortunately situated in this respect,—there are no striking passages or interesting sections. Mr. Williams's labours must wait quietly on the shelf of the practitioner, until by repeated trials he finds he will there meet more readily the information he wishes than in any other book; it is then that a work becomes almost part of the lawyer, and that he feels uneasy without having it within his reach; it is then that he begins to feel a regard and respect for it; to lean on it confidently, and constantly to invoke its aid; to be ready to excuse its defects, for the services it has rendered. It then becomes what the booksellers call, a "stock book;" the companion of the other great labourers in the vineyard, in every library. Whether Mr. Williams's work is to meet with this enviable lot, it is, we say, for time, and not for us, to determine. We can only add, that we have examined our author's labours, and that we see no reason to doubt that it will be found highly useful to the practitioner, and will supersede every other work of the kind. In the extended range of his subject, he has occasionally made omissions. Thus in stating the rules as to what will amount to a reduction of the wife's choses in action into possession by the husband, and when they will vest in his executor, and when in the surviving wife, p. *555, et seq.*, we are surprised that the author has not stated the recent important cases on the subject, of *Purdew* v. *Jackson*, 1 Russ. 1; *Honner* v. *Morton*, 3 Russ. 65; and the other cases on the point there stated. So also, in giving the rules as to the payment of debts, p. 651, *et seq.*, it should have been mentioned, that an annuitant creditor has a right to have an adequate portion of the assets set aside for the satisfaction of his annuity; and the case of *Slanning* v. *Style*, 3 P. Wms. 335, establishing this point, should have been stated. But we are bound in candour to say, that these are nearly the only faults of the kind we have been able to discover; and that they are over and over again redeemed by the clearness, accuracy, and labour which are exhibited in every page of the work.

ON THE PROPOSED REFORM OF THE ECCLESIASTICAL COURTS.

In a recent number (p. 118) we gave a full notice of the objections of Mr. Haworth to part of the alterations proposed by the Ecclesiastical Commissioners—particularly as to the removal of the Testamentary Jurisdiction from the Diocesan Courts. We have received a letter from a Correspondent, who supports the Commissioners' recommendations, and somewhat vehemently attacks the abuses of the present system of the Local Courts. Having inserted the objections, we are bound to admit an answer to them.

ON MR. HAWORTH'S REPLY.

Mr. Editor,

I will thank you to insert the following facts, as to the benefits arising from the Diocesan Court of Litchfield. 1st, The expence of probate, of searches, and of extracts, exceeds similar charges at Doctors' Commons. 2d, The proctors send circulars to the different solicitors, prior to each Probate Court, soliciting their attendance. How the intervention of solicitors is thereby prevented, I leave to Mr. Haworth to explain. 3d, The notice by the apparitor is an improvement upon the former practice of some proctors at Doctors' Commons, of soliciting, by their agents, every passer by to come to their office. A greater nuisance to the public than this apparitor notice, there cannot be. I have known the greatest collision in families by it; for no sooner has the undertaker departed, than the apparitor enters. A copy of the will is made, no matter how, whether well or ill. To this copy, the probate seal is annexed; and for this copy so made, under the direction of the apparitor, by the parties, the Court of Litchfield make the same charge as if copied by themselves. No inquiry is made as to *bona notabilia*, and when the property is to be collected, families are not able to obtain it through this apparitor probate. I beg to say, that upwards of twenty years' experience has convinced me, that one general Probate Court will be of the greatest benefit to the country.

A SUBSCRIBER.

MR. SERJEANT STEPHEN'S OBJECTIONS TO THE ABOLITION OF IMPRISONMENT FOR DEBT.

We have already stated[a] that the recent report of the Common Law Commissioners has not been signed by Mr. Serjeant Stephen; and we adverted in general terms to the nature of his dissent. It is now necessary to state the grounds of his objections, and we shall do so as briefly as possible. The learned Serjeant has entered at large into the discussion of every point and topic bearing on the question. The statement of his views, which follows the other Commissioners' Report, occupies about the same space as that document, and bears the name of a "Supplementary Paper." The question is argued with great clearness and ability on both sides; and the legislature, as well as the profession, will have the advantage of comparing the reasons for and against the abolition, and judging of the effect of the evidence, which is fully discussed in both papers.

We can readily believe that Mr. Serjeant Stephen has dissented from his brethren with great reluctance; and that it would have been as conducive to his ease as agreeable to his feelings, could he have arrived at the same conclusion as his colleagues.

We may first notice the particulars in which he concurs with the other Commissioners. They are as follow:

That a summary mode of proceeding should be allowed in cases of money bonds, bills of exchange, and notes; but that the security on granting a trial should not be absolute, but in the alternative of payment, or render to prison.

He agrees, that all kinds of property should be subject to execution upon judgment: but suggests a difficulty, as to the liability of stock in the public funds; but leaves that question to the statesman.

In all cases of liquidated debt, he concurs in opinion, that the plaintiff shall be entitled to interest, though perhaps not from the service of process.

But he contends,—1. That if the power of arrest *in execution* be taken away, the creditor will be much more frequently defeated by the concealment of the debtor's property.

2. The debtor without property will have no inducement to make those efforts, by which he now often succeeds in obtaining the means of payment.

3. The burthen and risk of realizing the property of the debtor will be constantly thrown upon the creditor, instead of being incumbent, as they ought to be, on the debtor himself.

4. It will encourage the practice of contracting debts improvidently, or with the direct purpose of defrauding the creditor, and will also encourage the debtor to dissipate property which ought to be applied to payment of his debts.

It is then urged by the learned Commissioner, in regard to the proposal to take away the power of arrest *before judgment*, 1st. That the creditor will be much more frequently defeated by the absconding of the debtor.

2nd, The creditor will be much more frequently defeated by the removal of property.

3rd, It will be much more frequently impossible to obtain payment without suit, and the attempt to recover payment by suit will be more frequently unsuccessful, and will be attended in general with more delay and expense.

4th, It will (like the abolition of arrest in execution) encourage the rash and fraudulent contracting of debt, and the dissipation of the property out of which the creditor should be paid.

The Serjeant has supported these positions, not only by his own knowledge of the subject, but by quotations from the evidence adduced before the Commissioners, by bankers as well as traders, both in town and country, and by members of the profession, of great experience. We are not prepared at present to sum up the result, especially as the Appendix is incomplete. Having inserted the whole of the Report in the last number of the Monthly Record, we hope to be enabled to include the principal parts, if not the whole of the "Supplemental Paper," in the next number of that part of the work. To enable our readers to peruse these able disquisitions on the important questions to which they relate, and which equally affect the public and the profession, we consider to be a part of our duty. We wish these projected alterations to be well examined; and during the ensuing vacation, we trust that we shall have an opportunity of completing whatever in this respect has remained unfinished. It is well observed by Mr. Serjeant Stephen, that it is more easy to relax the law, than, after an injudicious relaxation, to restore its former strictness; and he recommends proceeding "by gradual steps, and in a wary spirit."

[a] P. 132, *ante*.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

COMMISSION OF LUNACY.—EXAMINATION BEFORE COMMISSIONERS.—COSTS.

A commission of lunacy is granted against a married woman, though there is a trial pending in which the question of marriage and soundness of mind would be decided; and though the person who is admitted to have been married to her opposes it. There is no known instance of a trial of a traverse of a return to a writ of* habeas corpus *from the Court of King's Bench.

The person alleged to be of unsound mind, is not, in any question before a Court of Common Law, to be produced for the inspection of the jury; but may, and usually is, produced before a jury and commissioners, under a commission of lunacy.

Costs are not given, as of course, to a party who is allowed to attend and oppose the charge of unsoundness.

Sir *Edward Sugden* and Mr. *Knight* applied early in last term for a writ *de lunatico inquirendo* to be issued, to ascertain the state of mind of Rosa Matilda Mary Bagster, otherwise Mrs. Newton. The application was by petition, in the usual form; but several points were made upon the special circumstances of the case, which were these: the young lady is entitled to a large fortune, under the wills of two relations: she had lived with, and was under the guardianship of her mother and another, since the death of her father; and she arrived at the age of twenty-one last October. In the month of April last, she accompanied Mr. Newton to Scotland, was married to him at Gretna-Green, and they cohabited as man and wife for some days; after which, her mother and friends discovered and took her away. Mr. Newton, being refused access to her, applied to the Court of King's Bench, and obtained a writ of *habeas corpus* to produce her; but the guardians, instead of complying, made a return to the writ, that Mr. Newton had no right to interfere; that the marriage was not a valid marriage; and that the lady did not desire to leave her guardians. Mr. Newton undertook to traverse this return; and the counsel for the guardians undertook to join issue on that traverse. In support of the application now made for a commission, several affidavits were read. They were from medical men who had lately, for this purpose, conversed with the young lady. They thought her of imbecile mind. She freely talked to them of her marriage with Mr. Newton; but she said she did not know whether it was a farce or a marriage. She appeared wholly unconscious of any moral obligation on her in consequence of it. She named another gentleman to whom she would like to be married; and had the names of six on a card, any of whom she would marry; they were all in love with her, and she with them. Affidavits were also read from ladies who had the care of her education; and all of them agreed that she was of weak mind and very violent temper, and never able to make any progress in arithmetic, nor able to make any the smallest purchase. These, and an insinuation that Mr. Newton desired her for a wife on account of her fortune, were the grounds upon which it was urged that a commission ought to be issued, for the purpose of protecting herself and her fortune.

Mr. *Pepys* and Mr. *Jacob*, on the part of Mr. Newton, opposed the application. The young lady was now of age, and a married woman; and never, until she married a person whom the guardians did not like, did they think of issuing a commission of lunacy against her. She was always allowed to go to dinners, balls, parties, and such entertainments as other young ladies of her station go to. Affidavits of persons who knew her, and often met her at parties, were read, to shew that she conducted herself as discreetly as others did at such places. But the chief objection to a commission was, that it was seeking, at great expense and other inconvenience, to do, in two ways and at one time, that which could be done simply, and was now in progress of being done. The traverse of the return was to be tried in the Court of King's Bench; the question in that trial being the fact of the marriage, and the validity of the marriage depending upon the capability of the young lady to contract, the question of soundness of mind would come before a jury and judge more capable of deciding it than a commission. The issue in the traverse was already drawn; and the trial would come on soon, if the other side threw no obstacle in the way.

This case was before the Court several days; and the Lord Chancellor, at first, was inclined to refuse the commission, and leave the question to be decided by the Common Law tribunal.

The petitioners one day said they were going to demur to the whole proceedings in the Court of King's Bench, for such a traverse was never known. They afterwards abandoned that intention, and asked for judgment.

The *Lord Chancellor*, on inquiry from one of the officers of the Court of King's Bench, learned that there was no instance of a trial of the traverse of a return to a writ of *habeas corpus*. He also learned, that such trial, if it should be at all, could not come on before the end of October next. His chief hesitation in granting a commission, was on the belief that that trial could take place soon, and would decide the question of soundness of mind. On further consideration, he found that the young lady could not be produced before the jury upon that trial, as she might be, for inspection, upon a trial by commission. For these reasons, and also as, notwithstanding that there might be a verdict against the marriage upon the trial of the traverse, yet it might be still necessary to have a commission, to put the person and her property under the protection of the Lord Chancellor. He directed it to issue now to a Common Law Judge. He had also hesitated in coming to this decision in the ab-

ce of any case in which such a commission was issued against a married woman. A married woman, living under the protection of her husband, and seldom having a separate estate, did not so much require the protection of the Lord Chancellor; but there must have been many cases of married women having separate estates and being lunatics, yet not put under the protection of a commission. The Duchess of Norfolk was mentioned to him; but the commission did not issue against her, until after the Duke's death, though she was of unsound mind long before, and had a separate estate. There were, however, cases discovered after a search; and that *ex parte Chapman* (not reported) went on all fours with the present, and he would follow that, as an example. The fact of the marriage here was admitted; but the validity of it, on the grounds of weakness of mind, is in dispute.

Upon an application for an order for leave for Mrs. Newton to attend the execution of the commission by counsel, &c. an objection was made on the other side, that if such an order was made, an application would be hereafter made for costs out of the property of the lady, on the ground of that order. That was the invariable course.

The *Lord Chancellor* still granted the order for leave to the party to attend, but without prejudice as to costs.—*In re Bagster or Newton*, by the Lord Chancellor. Trinity Term, 1832.

KING'S BENCH.—PRACTICE COURT.

SERVICE OF PROCESS.—NEWSPAPER PROPRIETOR.

The service of process must be personal, and no difficulty in effecting personal service will dispense with it.

Service of process on a newspaper proprietor at the place of abode given at the Stamp Office, according to the 38 *Geo.* 3. *c.* 78. § 2, *is not sufficient, without personal service.*

Follett shewed cause against a rule, calling on the defendant to shew cause why service at 334, Strand, or 119, Fleet Street, should not be good service on the defendant. The action was for a libel, which appeared in the *Satirist* newspaper, of which the defendant was the editor and a proprietor, and the two addresses were entered at the Stamp Office, as those of one of the proprietors, pursuant to the provisions of the 38 Geo. 3. c. 78. § 2. The affidavit on which the rule had been obtained, stated, that various attempts had been made to serve the defendant, but without effect. That, however, did not dispense with the necessity of service of process "personally," which was required by the 5 G. 2. c. 27. § 1, referring to the 12 G. 1. c 29. § 1. Mr. Tidd (1 Prac. 169. ed. 9.) pointed out some of the cases in which an actual personal service was not necessary. For instance, "If the defendant refuse to accept a copy of process, it may be left in his house; or if he lock himself in, it may be put through the crevice of his door; as in the Common Pleas, it seems, that if he keep out of the way to avoid being served, it may be sent to him in a letter by the post. But sending process by the post in a letter, which defendant refuses to receive, is not good service; although the refusal may have been wilful, and accompanied with a long avoidance of service." In these cases, where the Court had dispensed with the necessity of personal service, it was clear that the process had come to the personal knowledge of the defendant, although not actually put into his hands.

Wightman, contrà, submitted, that it was only necessary sufficient should be shewn to induce the Court to believe the service of the process had come to the knowledge of the defendant. There was good reason to believe it had; for the defendant appeared in Court, by his counsel, to shew cause against the rule, which had been served in the same manner as the process; and he did not venture to swear that he had not been served. Besides, the place at which the process had been left, was the residence given at the Stamp Office, according to the directions of the 38 G. 3. c. 78. § 2. That statute would seem to have required the information, as to residence, to be given for the purpose of facilitating the service of process. If so, then this service would suffice.

Taunton, J.—I am afraid this rule must be discharged; for the statute requires the defendant to be served "personally." This has been considered necessary, though the defendant has persevered in avoiding personal service. The cases mentioned by Mr Tidd shew, that the Courts have been of this opinion. The case of *Aldred* v. *Hicks*, 5 Taun. 186, as to service by post, was afterwards overruled by *Redpath* v. *Williams*, 3 Bing. 443. There is no proof here, that the defendant was in the house at the time of leaving the process. This service only stands on the fact, that several attempts have been made to serve him, and he cannot be found. As to the statute of 38 G. 3. c. 78. § 2, requiring the printers, publishers, and proprietors of newspapers to deliver, at the Stamp Office, an affidavit containing their places of abode, that statute does not go on to say, that process may be served on any of them, by leaving it there. The Court, therefore, cannot engraft on that statute such an exception to the provisions of the 5 G. 2. c. 27. The rule must therefore be discharged, but without costs.

Rule discharged, without costs.—*Digby* v. *Thompson*, E. T. April 30th, 1832.

BANKRUPTCY COURT OF REVIEW.

ACCOMMODATION BILLS.—PROOF.

The assignees of a person who had received bills of exchange from another to meet his own acceptances for that other person, no pecuniary consideration having passed, cannot prove the bills (which were outstanding) under a commission against that other person, although the latter had paid away the acceptances, and the holder had proved

them, and received eleven shillings in the pound from the acceptor's estate.

Although there may be a right of action, yet, if there be an equity against it, proof cannot be admitted in bankruptcy.

This was the petition of the assignees of Joaquin Ruez de Alzedo, a bankrupt, to be allowed to prove under the commission against Lionel Knowles, Lionel Knowles the younger, and Stephen Hartley Knowles, bankrupts, five bills of exchange drawn by the latter, and accepted by D. and S., payable three months after date, respectively bearing the dates and for the sums following (that is to say): one dated the 1st day of September, 1825, for the sum of 898*l.* 14*s.*; one dated the 4th day of October, 1825, for the sum of 690*l.* 4*s.*; one dated the 17th day of October, 1825, for the sum of 293*l.*; one dated the 25th day of October, 1825, for the sum of 998*l.* 4*s.*; and one dated the 8th day of November, 1825, for the sum of 896*l.* 17*s.* The consideration of these five bills of exchange was five other bills of exchange accepted by Joaquin Ruez de Alzedo for the full amount of these five bills of exchange, and given by Joaquin Ruez de Alzedo to Messrs. Knowles and Sons, in lieu of and in satisfaction for the same, and which bills of exchange so accepted by Joaquin Ruez de Alzedo have been proved under the commission of bankrupt against him. These bills, so held by Alzedo, and in the hands of the petitioners, his assignees, were all drawn against bills for corresponding amounts and of corresponding dates, by Messrs. Knowles and Sons, upon the bankrupt Alzedo, for the accommodation of Messrs. Knowles and Sons, it being the understanding that he, by means of Messrs. D. and S.'s acceptances, should be in cash for the bills accepted by him at the time they became due. Both Messrs. Knowles and Sons and Mr. Alzedo having failed while the bills were running, Mr. Alzedo's acceptances were proved by the parties with whom Messrs. Knowles and Sons had discounted them, under both estates; and Mr. Alzedo's estate has paid a dividend of 11*s.* in the pound upon the bills for which he had no consideration, except the drafts of Messrs. Knowles and Sons upon Messrs. D. and S., now in the possession of his assignees. The question upon these bills, therefore, resolved itself into a point of law, whether the assignees of Alzedo could rank as creditors upon the estate of Knowles and Sons, either for the full amount of the bills, or for the amount of the dividend actually paid upon the cross bills accepted by Alzedo. On the 3d of December, 1825, the commission issued against Knowles and Sons. On the 13th of December, 1825, a commission issued against D. and S.; and on the 25th of November, 1825, the commission against Alzedo was issued.

Mr. *Montagu* and Mr. *Swanston*, for the petitioners.

Mr. *Pattisson* and Mr. *Wright*, for the respondents.

On the part of the petitioners, it was contended, that they had a right to prove the five bills under the commission against Knowles and Sons, the acceptances given in exchange for them being a sufficient consideration, and the latter having been proved under the commission against Alzedo by the holders, who had received dividends to the amount of eleven shillings in the pound.

The Right Honourable *Thomas Erskine*, C. J.—As to these five bills drawn by Knowles and Sons on D. and S., payable to Alzedo, and the consideration for which was five other bills accepted by Alzedo, the question is, whether the assignees of Alzedo can prove these five bills against the estate of Knowles and Sons. The fact that the estate of Alzedo has paid eleven shillings in the pound on his acceptances can make no difference. If the bills had been negociated by Alzedo, the holder might have proved them against the estate of Knowles and Sons; for the holder, if he had given a full consideration for them, would have had a good claim both at law and in equity; but the consideration given for these bills by Alzedo to Knowles and Sons was only counter bills. It therefore appears to me that the assignees of Alzedo are not in a condition to prove these five bills under the commission against Knowles and Sons, unless they can place themselves in a situation to take up the bills given for them. All the cases seem to point to this conclusion. Between solvent parties the case would be different; but in equity, when the party is not in this condition, the bills cannot be proved.

His Honour Sir *John Cross*.—A man can only come in to prove for a debt; but no debt is shewn in this case, as between these parties. At the time the commission issued against Knowles and Sons, Alzedo had no right to prove these bills against their estate. The payment of dividends does not alter the position of him or his assignees.

His Honour Sir *George Rose*.—In November, 1825, Alzedo became bankrupt, and he then held these bills. Admitting that he legally had a right of action against Knowles and Sons, yet they coming into equity and shewing that no consideration had been given for these bills, the action would be restrained; and Alzedo's statement that he had paid eleven shillings in the pound on his acceptances of these bills, would not have been a ground for dissolving the injunction, unless he could have given up the bills, or offered a sufficient indemnity for the difference between eleven shillings in the pound and the whole debt. Although there may be a right of action, yet, if there be an equity against it, proof cannot be admitted in bankruptcy. If there be an equity against a debt, there cannot be proof. Alzedo being the acceptor, is the person primarily liable. How then does he stand as a security? As such, he cannot prove for a debt paid after the commission, for he has not paid the whole debt, nor any part of the debt in discharge of the whole. The debt then has not been discharged, and the petition must be dismissed.—*Ex parte Solarte, Assignees of Alzedo, in the matter of Knowles*, June 20th, 1832. B. C. R.

NOTES OF THE WEEK.

House of Lords.

CONTEMPTS IN EQUITY.

This Bill was read a third time on the 22d ult. and passed.

PUNISHMENT OF DEATH.

This Bill passed on the 2d inst.

LUNATICS.—FINES AND RECOVERIES.—LIMITATION OF ACTIONS.—INHERITANCE.—CURTESY.—CONTEMPTS IN ECCLESIASTICAL COURTS.

These Bills wait for the second reading.

REMEDIES AGAINST THE HUNDRED.—ANATOMY.

Waiting for Committees.

SENTENCE OF DEATH EXPLANATION.

Waiting for report.

House of Commons.

GENERAL REGISTER.—ATTESTATION OF INSTRUMENTS.—STATUTE OF FRAUDS AMENDMENT.—USURY.

Waiting for the second reading.

BANKRUPT ACT AMENDMENT.—SHERIFFS' EXPENSES.

Waiting for report.

TITHES' PRESCRIPTION.—ARBITRATION.—DOWER.—EXCHEQUER COURT OFFICERS.—WITNESSES IN EQUITY.—LUNATICS' COMMISSIONS.

Waiting for Committees.

PUNISHMENT OF DEATH ABOLITION.

Lords' Amendments to be considered.

BIRTHS' REGISTRATION.

Waiting for further consideration of report.

PRIVILEGES OF PARLIAMENT.

A notice of motion has been given, that no process under this Bill shall be issued against a member of the House until a Writ of Execution shall have been taken out, and a return of *nulla bona* made by the sheriff.

ANNUAL MEETING OF THE INCORPORATED LAW SOCIETY.

The first Annual General Meeting under the Charter of this Society, was held in the Hall on Tuesday the 3d inst. Mr. Iltid Nicholl, the King's Proctor, presided. The whole of the twenty-four members of the Committee, and the three Auditors, were re-elected. The Reports of the Auditors and of the Committee of Management, were read and approved. It appeared that the number of members had increased during the past year, from 704 to 834; and that the whole capital of 50,000*l.* had been collected, except the sum of 305*l.*

It was also stated that several of the Judges and other distinguished individuals, and eminent Authors, had testified the interest they felt in the objects of the Society by valuable donations of books, which, including those presented by the members of the Society, amounted to one thousand volumes, and to 168*l.* in money.

The Committee have framed Regulations for the admission of Members, the payment of Subscriptions, the transfer of Shares, the time of opening and closing the Hall, Library, Registry and Deposit Offices, and the terms of letting the strong rooms and rooms for Meetings.

The Subscription for the remainder of this year for the Hall, Library and Registry, payable by *Town* Members, or those residing within twenty miles, is 1*l.* 10*s.*, and by *Country* Members, 1*l.*

The Building (except the Club Room) was opened for the use of the Members on Wednesday the 4th instant. The hours of attendance at present fixed by the Committee, during the Sittings of the Courts, are as follow:—The *Hall*, from 9 till 6; the *Library*, from 10 till 4, and it is also open in the evening; the *Registry* Office, from 9 till 5, and 7 till 9; and the *Deposit* Office, from 11 till 3.

The Committee have recommended that the hours for the principal resort of the Members to the Hall, should be understood to be from 2 to 4 o'clock daily.

The arrangements for opening the Club Room are not yet completed.

ANSWERS TO QUERIES.

PRACTICE.

RULE TO PLEAD BEFORE NOTICE OF DECLARATION. P. 111, *ante.*

Had it not been for the letter of W. W. C. representing the fact to be so, I should have conceived it very improbable (if not impossible) that the assistant masters in the Court of King's Bench should differ in their opinion respecting the above point, as it seems to me to be a natural consequence, "that a rule to plead should be given *after, and not before,* notice of declaration;" for of what possible use can it be, to give a rule to plead to a declaration which has never been delivered, or no notice of the filing thereof furnished; for is not the plea, in a measure, regulated by the nature of the declaration? Under these circumstances, I apprehend, there can be little doubt of the irregularity in the service of it, before notice or delivery of the declaration; but I much question, whether it is such an one as would justify the proceedings being set aside. *Vide* Chitty's Practice, K. B. C. P. & Ex. 92, and Tidd's Prac. 7 ed. 487. R. B.

COMMON LAW.

STATUTE OF LIMITATIONS. P. 111, *ante.*

Taking the debt of *B.* to be one of simple contract, there can be no doubt but that he is clearly barred by the statute of limitations; and that the residuary legatees can establish the will against him. Of course *B.* (if his debt had not been within the statute) would have been justified in retaining his debt. See Toller's Exec; 295. & 10 Mod. 496. R. B.

CURATE—CHURCHWARDEN. P. 112, *ante.*

Unless properly delegated by the rector to act for him, I conceive an unlicensed curate would not (more than any other individual) be entitled to appoint a churchwarden. R. B.

PARTNERSHIP.—BANKRUPTCY. P. 112, *ante.*

In this case, I submit, the partnership effects *are not* liable to a private debt of *B.'s*, contracted antecedent to his partnership with *C.*; and consequently, that *A.* could not sue out a joint commission, nor could he, in the event of a *flat* being issued against *B.* & *C.* by any other person, prove his debt against the partnership assets; his remedy would be either that of a separate commission, or on his warrant of attorney given him by *B.* alone. R. B.

HUSBAND AND WIFE.—MARRIAGE ARTICLES. P. 112, 113, *ante.*

The question of H. B. A. is almost an answer to itself; as it expressly states, that by the marriage articles the husband stipulates to leave his wife a certain sum, and that nothing contained in the same articles should debar her of any thing further he might choose to bequeath. Such being the case, I consider the wife clearly entitled to both. R. B.

WILL.—ALTERATIONS. P. 112, *ante.*

As the allowance of wills is entirely regulated by the apparent intentions of the deceased, I have no doubt but that the copyholds alluded to by H. B. A. would pass. It has been held, that in a will partially cancelled or altered, that part which is unobliterated will not be revoked by the other being expunged. *Sutton* v. *Sutton*, Cowp. 812. R. B.

QUERIES.

PRACTICE.

EXECUTION.—COSTS.

A *fi. fa.* was issued on a judgment for want of a plea, at the beginning of this vacation, and possession taken by the sheriff, when it appeared the defendant had made an assignment of his goods to a broker, but retained possession by written agreement with the purchaser; on the plaintiff's attorney withdrawing execution the day after it was put in, could he legally issue a *ca. sa., then,* without first getting the *fi. fa.* returned *nulla bona;* or waiting till Michaelmas term, on the sheriff refusing to make a return before. Assuming that a *ca. sa.* might issue, could the costs of the *fi. fa.* and warrant, 10*s.* 6*d.*, be included in the indorsement of the *ca. sa.*, the first execution writ being abandoned and no levy made. This case differs from *Lawes* v. *Codrington*, Vol. 1. L. O. p. 252, where levy was made, and part of the amount realised by the *fi. fa.* Y.

COMMON LAW.

TROVER.—ASSIGNEES.

Previously to *A.'s* bankruptcy, *B.* lent him the sum of 500*l.*, by a cheque on his banker, *for certain specific purposes,* viz. of satisfying some of his (*A.'s*) creditors. A short time subsequent to such advance, *and to his being declared a bankrupt, A.* returned the cheque to *B.* (which he had not applied as was intended). Under these circumstances, would not *A.'s* assignees fail in an action of trover against *B.* for the recovery of the cheque, or would the transaction be considered as fraudulent in consequence of an undue preference?

R. B.

MISCELLANEA.

SIR WALTER SCOTT ON THE ENGLISH AND FRENCH SYSTEMS OF JURISPRUDENCE.

The certainty of the English jurisprudence, (for, in spite of the ordinary opinion to the contrary, it has acquired a comparative degree of certainty), rests upon the multitude of its decisions. The views which a man is disposed to entertain of his own rights, under the general provisions of the law, are usually controlled by some previous decision of the case; and a reference to precedents, furnished by a person of skill, saves, in most instances, the

expense and trouble of a law suit, which is thus stifled in its very birth. If we are rightly informed, the number of actions at common law, tried in England yearly, does not exceed betwixt five-and-twenty and thirty on an average, from each county; an incredibly small number, when the wealth of the kingdom is considered, as well as the various and complicated transactions incident to the advanced and artificial state of society in which we live.

But we regard the multitude of precedents in English law as eminently favorable, not only to the certainty of the law, but to the liberty of the subject; and especially as a check upon any judge, who might be disposed to innovate either upon the rights or liberties of the lieges. If a general theoretical maxim of law be presented to an unconscientious or partial judge, he may feel himself at liberty, by exerting his ingenuity, to warp the right cause the wrong way. But if he is bound down by the decision of his learned and wise predecessors, that judge would be venturous indeed who should attempt to tread a different and more devious path than that which is marked by the venerable traces of their footsteps; especially as he well knows that the professional persons around him, who might be blinded by the glare of his ingenuity in merely theoretical argument, are perfectly capable of observing and condemning every departure from precedent.* In such a case he becomes sensible, that, fettered as he is by previous decisions, the law is in his hands, to be administered indeed, but not to be altered or tampered with; and that if the evidence be read in the Court, there are and must be many present who know as well as himself what must, according to precedent, be the verdict or the decision. These are considerations which never can restrain or fetter a judge who is only called upon to give his own explanation of the general principle, briefly expressed in a short code, and susceptible therefore of a variety of interpretations, from which he may at pleasure select that which may be most favorable to his unconscientious or partial purpose.

It follows, also, from the paucity of laws afforded by a code, constructed not by the growth of time, but suggested by the ingenuity of theorists suddenly called to the task; and, considering its immense importance, executing it in haste,—that many provisions, most important for the exercise of justice, must of course be neglected in the French code. For example, the whole law of evidence, the very key and corner-stone of justice between man and man, has been strangely overlooked in the French jurisprudence. It is plain that litigation may proceed for ever, unless there be some previous adjustment (technically called an issue) betwixt the parties, at the sight of the judge, tending to ascertain their averments in point of fact, as also the relevancy of those averments to the determination of the cause. In England, chiefly during the course of the last century, the law of evidence has grown up to a degree of perfection, which has tended, perhaps more than any other cause, at once to prevent and shorten litigation.

If we pass from the civil to the penal code of procedure in France, the British lawyer is yet more shocked by a course which seems, in his view, totally to invert and confound every idea which he has received upon the law of evidence. Our law, it is well known, is in nothing so scrupulous as in any conduct towards the prisoner, which may have the most indirect tendency to entrap him into bearing evidence against himself. The law sympathizes, in such a case, with the frailties of humanity, and, aware of the consequences which judicial inquiries must always have on the mind of the timid and ignorant, never pushes the examination of a suspected person farther than he himself, in the natural hope of giving such an account of himself as may procure his liberty, shall choose to reply to it. In France, on the contrary, the whole trial sometimes resolves into a continued examination and cross-examination of the prisoner, who is not only under the necessity of giving his original statement of the circumstances on which he founds his defence, but is confronted repeatedly with the witnesses, and repeatedly required to reconcile his own statement of the case with that which these have averred. With respect to the character of evidence, the same looseness of practice exists. No distinction seems to be made between that which is hearsay, and that which is direct; that which is spontaneously given, and that which is extracted, or perhaps suggested, by leading questions. All this is contrary to what we are taught to consider as the essence of justice towards the accused. The use of the rack is, indeed, no longer admitted to extort confession; but the mode of judicial examination seems to us a species of moral torture, under which a timid and ignorant, though innocent man, is very likely to be involved in such contradictions and inextricable confusion, that he may be under the necessity of throwing away his life, by not knowing how to frame his defence. We must, however, frankly confess, that the manners and customs of a country make the greatest difference with respect to its laws; and that a system may work well in France, and answer all the purposes of jurisprudence, which in England would be thought very inadequate to the purpose. The humane institution which allows the accused the benefit of counsel, is a privilege which the English law does not permit to the accused, and may have its own weight in counterbalancing some of the inconveniences to which he is subjected in France. It seems also probable, that the deficiency in the case, arising from its recent origin and compressed form, must be gradually remedied as in England, by the course of decisions pronounced by intelligent and learned judges; and that what we now state as an objection to the system, will gradually disappear under the influence of time.

* The intelligent reader will easily be aware, that we mean not to say that every decision of their predecessors is necessarily binding on the judges of the day. Laws themselves become obsolete, and so do the decisions which have maintained and enforced them.

The Legal Observer.

VOL. IV. SATURDAY, JULY 14, 1832. No. XCI.

> ——— "Quod magis ad nos
> Pertinet, et nescire malum est, agitamus."
> HORAT.

ON THE ABOLITION OF IMPRISONMENT FOR DEBT.

We have, in our two last numbers, laid before our readers an abstract of the contents of the Fourth Report of the Common Law Commissioners, and have given the whole of the suggestions of four of the Commissioners in our last Monthly Record. We have had full time to consider the alterations which they propose, and the objections to them urged by their learned brother Commissioner, Mr. Serjeant Stephen; and we shall now give our opinion on the subject. We do not think that any prejudice exists in our minds as professional men, as to the abolition of imprisonment for debt; it is entirely a question affecting the public, which has been committed to the care of lawyers, as the most able to determine it satisfactorily. We shall, therefore, have the less hesitation in freely expressing the result of our experience and deliberation on the matter.

The great object of the law of debtor and creditor is, to compel a prompt and effectual payment of debts; and for that purpose to obtain the whole of the property belonging to the one, for the benefit of the other. The present law is admitted on all sides to be defective for this purpose. Many kinds of property cannot be reached at all: and the methods for obtaining any kind are unnecessarily dilatory and expensive. Under these circumstances, the proper course seemed to be, that the defects of the existing system should be remedied; that all the present means for obtaining the great object of the law should be preserved, and that others should be devised in addition to them.

The mode for compelling payment of a debt, and obtaining the property of the debtor, hitherto most usually resorted to, has been an arrest of his person. In some instances, it has been found ineffectual; but in the great majority of the cases in which it has been employed, it has been found the most easy and complete. Laws are made for the bad, and not for the good; and although occasionally the power of arrest has been abused, and occasionally it has worked some hardship, yet in general it has been found effectual for the purpose;—the mere threat of its enforcement being frequently sufficient. It has been found, that fraudulent and dilatory debtors would evade all other laws but this; that they have had an inexhaustible fund of excuses for not paying what was owing; that they would submit to any loss of character or reputation; but that the deprivation of liberty, threatened or actual, generally effected the desired object; and that this has been not only the most sure mode that could be employed, but also the most speedy. It has also been found, that the cases of actual oppression and hardship are comparatively rare; that the creditor will not have recourse to his power of arrest until milder means have failed; and that more especially, the power has not been generally exercised, except where the creditor had good reason for thinking that the debtor could, but would not pay. The peculiar circumstances are, in general, best known to the parties interested in each particular case; and it has been found wise to arm the creditor with the power, leaving him to apply it as it might be required. We believe that creditors are not ordinarily unmerciful; that they are willing to make all fair allowances, and to give reason-

able time. These we conceive are the settled principles on the subject: and if we wished confirmations and illustrations of them, we should find them most readily in the evidence appended to the Report now under consideration. True it is, that there have been scattered opinions to the contrary. A misplaced sympathy has lately been endeavoured to be excited for the debtor. Stories have been told in the House of Commons, and public meetings, which the narrators believed to be, and which probably may have been true—proving, however, nothing more than that bad men will occasionally have the power of working injustice by the means of righteous laws. But it was proper that an enquiry should be instituted, and it was committed to the Common Law Commissioners, as the persons the best qualified to deal properly with the subject, and to devise a remedy for the great defect in the existing law, injurious alike to the interests of the debtor and creditor; we mean, the want of facility of surrendering the whole of the property of the one for the benefit of the other. It seemed only fair and reasonable, that on the one hand the creditor should be armed with the most ample power to obtain the fullest surrender of the effects of the debtor, and on the other, that when this surrender should be made the debtor should be free. The Commissioners have accordingly entered into the enquiry, and the majority of their number have made the present Report; but we cannot restrain our surprise, in finding that they deliberately propose to deprive the creditor of the great power which he now enjoys—the arrest of the person of the debtor, not only on mesne process, but on final execution! We have already stated their grounds for this opinion, and shall now only mention some points in the Report, worthy of especial notice.

They first trace correctly the history of the law of arrest on mesne process, bringing it down to the 7 and 8 Geo. 4, c. 71, the last act on the subject, which enacts that the power shall not be exercised for any sum under 20*l*. They then point out the well known defects in the present process of execution; that "nothing can be taken under it but goods and chattels, properly so called, which do not include bank notes, bills, book debts, money in the funds, annuities, pensions, or sums secured by contract or agreement," p. 247[a]; and add, "*unless the person of the debtor could be detained until the debt was satisfied*, the judgment would frequently be fruitless, though the debtor might be possessed of ample property, which could not be reached by any process," p. 247. The laws relating to insolvent debtors are then shortly stated, and they proceed to mention "the practical effects of the existing law of arrest and imprisonment." They conceive, that serviceable process is as effectual as bailable process,—giving, among others, a somewhat whimsical reason, that "arrest tends to irritate the debtor, and to provoke him to resistance, by giving bail, and to *take revenge by going to prison*, and placing his property beyond the reach of his creditor," p. 249. This appears to us a strange sort of revenge. "Where there are several creditors, the first arrest creates alarm; successive arrests produce a great waste of funds in law expenses, and consequently diminish, if not *totally exhaust*, the property of the debtor," p. 249. This is stated as the usual consequence of arrests; whereas it appears to us to be the exception; and this, we think, is the prevailing error of the Report. It proposes to legislate for the hundredth case, and not for the ninety-nine. The Commissioners then dwell at great length on the hardship which arrests on mesne process frequently work with the fair debtor; "An arrest," they say, "is oppressive, frequently ruinous, even to a solvent man, whose property is embarked in trade," p. 253; and yet they admit that "bail, as is well known, may always be procured on a premium proportioned to the risk." How, then, if bail can be had, can arrest often prove ruinous? In many other parts of the Report, the reasons given for the intended change are equally unsatisfactory, as we think our readers will admit by a reference to it. We shall probably soon return to its examination.

[a] We quote from the Monthly Record for June.

CHANGES IN THE LAW DURING THE PRESENT SESSION OF PARLIAMENT, 1831—1832.

No. II.

THE REFORM ACT, 2 W. 4. c. 45.

(*Continued from page* 147.)

SECONDLY—*As to the mode of obtaining the right of voting.* By sec. 26, no person shall be entitled to vote unless he shall have been duly registered; and he shall not be

registered in respect of his estate, if of freehold, copyhold, or customary tenure, unless he shall have been in the actual possession of the lands, &c. or in the receipt of the rents and profits thereof, for his own use, for six calendar months at least next previous to the last day of July in such year, and for twelve calendar months if of leaseholds; but it is provided, that if the lands entitling a person to vote for a county, shall come to any person within such six or twelve months, by descent, marriage, devise, or promotion, such person shall be entitled to have his name registered as a voter. By the 18 G. 2, c. 18. § 5, the previous possession must have been twelve months in freeholds as well as leaseholds.

Before this act, where the right of voting depended on the voter's being rated, if his name had been omitted on the rate, it was necessary to prove both rateability, and due diligence on the part of the voter to get on the rate; but by sec. 30, it is enacted, that in every borough which shall return a member, any person occupying a house, &c. in any parish in which there shall be a poor's rate, may claim to be rated to the relief of the poor in respect of such premises, whether the landlord shall or shall not be liable to be rated to the relief of the poor in respect thereof; and upon such occupier so claiming, and actually paying or tendering the full amount of the rates, if any, then due in respect of such premises, the overseers of the parish in which such premises are situate, are hereby required to put the name of such occupier upon the rate for the time being; and if they shall neglect or refuse so to do, such occupier shall nevertheless be deemed to have been rated for the relief of the poor, in respect of such premises, from the period at which the rate shall have been made.

THIRDLY, *As to the registration of votes.*—The overseers of the poor, on the 20th of June in every ensuing year, are to fix upon the doors of all the churches and chapels within the parish, or, if there shall be no church or chapel, then in some public situation, a notice, given in the act, requiring all persons entitled to vote for the county, to deliver to the overseers, on or before the 20th day of July in every year, a notice of their claim, in the form prescribed in the act; and if a person shall have been once registered, he need make no further claim, unless he changes his residence, (sec. 37). The overseers are then, before the last day of July, to make out a list of all persons claiming to be inserted in the list of county voters; and, if they see reason, they may add the words "objected to" to the list, and are to keep copies of the list for inspection. Any person on the register, or claiming to be inserted thereon, may object to any person being freshly entered, in the manner prescribed by the act; and the lists of persons objected to shall be published. The lists of the voters, and of those objected to, are then to be forwarded to the Clerks of the Peace, who shall transmit the same to the barrister appointed under the act, (s. 40). The barrister is to be appointed, if for Middlesex, by the Chief Justice of the King's Bench; and for every other county, by the senior Judge for the time being in the commission of assize; and such barrister shall give public notice that he will make a circuit of the county, and of the times and places at which he will hold courts, for the purpose of revising the lists, such times being between the 25th of September and the 25th of October. The clerk of the peace shall, at such court, produce the several lists of voters; and the overseers shall attend the court, and deliver to the barrister a copy of the list of the persons objected to, and shall answer upon oath all questions which the barrister may put. The barrister shall retain on the lists of voters the names of all persons to whom no objection shall have been made by the overseers, and of every person objected to by third persons, if they shall not appear in support of their objection: but when the objection is supported, the barrister shall enquire into its validity; and if it shall be proved to his satisfaction, the barrister shall expunge the name from the list, as also the names of persons who are dead, and rectify mistakes, and supply omissions, (sec. 42). By sec. 43, the barrister shall have power to insert in the county lists the names of claimants omitted by the overseers, on proof of claim and qualification.

In cities and boroughs entitled to return members, the overseers are to make two alphabetical lists,—one of all persons entitled to vote in respect of the occupation of premises of the yearly value of 10*l.*; and the other, of all persons entitled to vote in respect of any other claim; and keep copies of such lists for inspection, as in the county lists; and by sec. 46, the town clerks are to prepare and publish lists of freemen, and persons omitted in the list may give notice of their claim; and the list of claimants, and of persons objected to, are to be published.

By sec. 49, barristers are to be appointed in the same manner as for counties, to revise the respective lists of voters for the

cities and boroughs; and they are to proceed as before described respecting counties, (sec. 50). To assist in making out the lists, overseers may inspect tax assessments and rate books; and the barrister has power to adjourn the court, to administer oaths, and finally to determine and settle all objections, and settle and sign the lists in open court; and the judges may appoint additional barristers in case of need (sec. 51). When the lists shall have been so signed, if of county voters, they shall be transmitted to the clerk of the peace; if of borough voters, to the returning officer, who shall keep them among the records of the sessions, and cause them to be copied into books, and numbered, and such books shall form THE REGISTER OF THE ELECTORS (sec. 52); and copies of the lists, and of the registers, are to be printed and sold for a reasonable price, to all persons applying for them (s. 55).

By sec. 56, the expenses of the overseers and clerk of the peace, are to be defrayed by the payment of one shilling to such overseer, by every person giving notice of his claim as an elector for a county; and every elector for a city or borough shall pay one shilling annually, which shall respectively form a fund from which the expenses shall be defrayed.

By sec. 57, every barrister shall be paid by government, at the rate of five guineas a-day, when he shall be employed, over and above his travelling expenses.

The correctness of the register may be impeached before a Committee of the House of Commons, by any person complaining by petition of an undue return of any member, (sec. 60).

Any barrister, or overseer, who shall wilfully disobey the provisions of this act, is liable to be sued for 500*l*. (s. 76).

[*To be concluded in our next.*]

NEW BILLS IN PARLIAMENT.

A BILL FOR THE ABOLISHING THE PUNISHMENT OF DEATH IN CASES OF FORGERY.

Reciting, That by an Act passed in the first year of his present Majesty's reign, intituled, "An Act for reducing into one Act all such Forgeries as shall hereafter be punished with Death, and for otherwise amending the Laws relative to Forgery," it was provided, That if any person should, after the commencement of that act, be convicted of any forgery, or other offence therein named or described, for which he would at the time of the passing of that act have been liable to the punishment of death, he should not suffer death for the same, unless the same shall be made punishable with death by that act: And reciting, that it is expedient to abolish the punishment of death altogether for offences of that nature; be it therefore enacted, That so much of the said act as enjoins or authorizes the infliction of the punishment of death in any case whatever, shall be and the same is hereby repealed; and that every person who shall after the passing of this act be convicted of any offence whatever, which was made punishable with death by the said act, shall, at the discretion of the Court before whom such conviction shall take place, be transported beyond the seas for the term of such offender's life, or for any term of years not less than seven, or be imprisoned, with or without hard labour, for any time not exceeding four years, nor less than two years; and it shall be lawful for the Court to direct that such offender shall be kept in solitary confinement for any portion or portions of such imprisonment, as to the Court shall seem meet.

And in order to prevent justice from being defeated by clerical or verbal inaccuracies; be it enacted, That in all informations or indictments for forgery, or in any manner uttering any instrument, it shall not be necessary to set forth any copy or fac simile of such instrument, but it shall be sufficient to describe the same in such manner as would sustain an indictment for stealing the same, any law or custom to the contrary notwithstanding.

STATE OF THE CRIMINAL LAW IN AMERICA.

We have already noticed Mr. Vigne's "Six Months in America," so far as he treats of the Civil Courts, and the mode of administering Justice therein. We now advert to the account he has given of the state of the Criminal Law.

He commences by describing the Penitentiary of Pennsylvania, in which, he observes, the only punishment adopted is solitary confinement.

"This Penitentiary is too young an establishment to afford a perfect confidence in the opinions of those who are favourable to its system. The reports of the inspectors are, however, extremely encouraging. The first and present warder (Mr. Samuel R. Wood) was only appointed in June 1829. This gentleman, who is well known as a kind of second Howard in his way, has visited many of the principal prisons in Europe; and now finds employment for his talents and his humanity in, I believe, his native city. Every crime committed in the state of Pennsylvania, on this side of the Alleghany mountains, that is punishable by imprisonment at all for the space of one year or more, is to be expiated by solitary con-

finement within this Penitentiary. That at Pittsburg, on the Ohio, receives those whose crimes are committed on the western side of the Alleghany. Every prisoner is allowed to work at his trade; or if he have none, or one that he cannot follow in his cell, he is allowed to choose one, and is instructed by one of the overseers, who are all masters of different trades. Mr. Wood, in his last report, gives it as his opinion, that a prisoner who has two years or upwards to remain in prison, can, in his solitary cell, earn sufficient to clear all his expenses from his admission till his discharge. The Philadelphia system differs from that at Sing-sing, in the state of New York. At Sing-sing, the prisoners are brought out to work together, but are not allowed to speak to each other. At Philadelphia they never work together; and from the time of his admission, one prisoner never sees, or speaks with, another. My English ideas were not a little startled at first, when I found that high treason is expiable by solitary confinement for not less than three, nor more than six years; and that the punishment for the second offence was solitary confinement for ten years. Treason against the state of Pennsylvania is here alluded to. By the articles of the constitution, treason against the United States shall consist only in levying war against them; or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted. Treason against the United States is a capital offence. Murder, in the second degree, that is, murder committed in a sudden quarrel, but without malice prepense, is punished by solitary confinement at labour for three, and not more than six years; for the second offence, for a period not exceeding ten years. The punishment for burglary is solitary confinement for not less than two, nor more than ten years; for the second offence, for a period not exceeding fifteen years. For robbery, or being accessory thereto before the fact, the period is for not less than one, nor more than seven years; for the second offence, for a period not exceeding twelve years. Mayhem, kidnapping, horse-stealing, perjury, &c. are all punished by solitary confinement for different periods. Almost every species of forgery, or aiding, abetting, or commanding the perpetration of a forgery, whether it be of the coin of the state, or have reference to the sale, utterance, or delivery, or having in possession the metallic plate used in the forging of any note of any bank incorporated in the state of Pennsylvania; or forging, defacing, corrupting, or embezzling any charters, gifts, grants, bonds, bills, wills, conveyances, or contracts; or defacing, or falsifying any enrolment, registry, or record; or forging any entry of the acknowledgment, certificate, or endorsement, whereby the freehold or inheritance of any person or persons may be charged; or of counterfeiting the hand or seal of another with intent to defraud; or the privy or great seal of the state of Pennsylvania, is punished with solitary confinement for a period of not less than one, nor more than seven years; and for the second offence, for a period not exceeding ten years. It is expected that few offenders will run the risk of solitary confinement for a second time.

"When first received, the prisoner is left alone, and it seldom happens that he does not ask for a Bible, and work, after the lapse of a few hours. A Bible and a few other religious books are allowed him. In a few days the withdrawal of his employment is felt, and adopted as a punishment, with the most obstinate and hardened. The chaplain occasionally visits the prisoners, and on Sundays he takes a station whence the words of prayer and exhortation can be heard by every prisoner in his cell, as they echo along the vaulted roof of the corridor.

"If any punishment can be said to be dignified, that of solitary confinement has a claim to that epithet. Justice to society is nobly done, not only in the removal of the prisoner in the first instance, but, secondly, by enabling him to return, as it were, to the world, a wiser and a better man. The end of solitary confinement is the reformation of the criminal, by obliging him to think who never thought before. If reflection can be awakened, and conscience can obtain a hearing, its advantages will be readily acknowledged. The prisoner is forced to commune with his own soul: the all-powerful voice of ridicule is absent and unheard; remorse is not stifled, and penitence is not put to flight, by the sneers of a dissolute companion: with no one to admire and applaud his resolution to be 'game,'—to submit, is the only alternative.

"In England the system could not generally, I think, succeed. The effect of solitary confinement might be the same on the moral character of the prisoner, but unless something like a permanent means of getting a livelihood be secured to him, after his removal from the prison, the principal and best object of the punishment would not be obtained. This would be extremely difficult in a country of small extent, with a superabundant population, and a supply of labour far exceeding the demand. The regenerated offender might, perhaps, contrive to avoid observation; but if necessity compelled him to labour for his subsistence, it is probable that he would not find employment; and the necessary consequence would be, that all his good resolutions would vanish at the approach of want.

"No country is so well adapted for the experiment as the United States of America. Enterprise is abroad in every direction, and labour is well paid. When the period of confinement is at an end, the criminal may wander to any corner of that vast continent,—and go where he will, the wages of industry are always at his command. He is in little fear of being recognised by his fellow-prisoners, because no prisoner is allowed to see another. His former

associates in crime are dispersed, or in prison, or in the grave; and the hope that attended him in his cell is realised, by the facility of gaining a new character, and friends who are ignorant of his crime. It should be added to this notice of the Penitentiary, that every cell opens into a small paved court-yard, in which the prisoner can take exercise; and that the system has not been found prejudicial to health of mind or body, as had been anticipated."

PROPOSED ALTERATIONS IN CHANCERY COSTS.

We have received from a Correspondent the following Bill of Costs of a Plaintiff in a Chancery Suit, with observations and proposed charges to be made in lieu of the present allowances. The principle of our Correspondent has been to pay a Solicitor for what he actually does. On the present system he makes large advances, and is very inadequately remunerated. We cannot, however, engage to say that this Scale of Fees will be altogether satisfactory. We think, however, that our Corresepondent has pointed out some important improvements, and we shall be glad to receive the opinions of other Practitioners of experience.

Easter Term.	Present Charge. £ s. d.		Proposed Charge. £ s. d.
Instructions for bill	0 13 4	As between party and party, this may be considered as a proper allowance; but as between solicitor and client, it would be better that the actual number of attendances should be substituted, and allowed for at the rate of 6*s.* 8*d.* per hour	0 18 4
Drawing same, fo. 60	3 0 0	This should be abolished, as it is never (or at least very rarely) done by the solicitor, and the following substituted in its place:—	
		Drawing statement for counsel to draw bill, 6*s.* 8*d.* per sheet of 10 fo.	
		Fair copy, 3*s.* 4*d.* do.	
		Supposing the statement to be 4 sheets for drawing, and 6 copying, the charge would be	2 6 8
Fee to counsel to settle, &c.	3 5 6	This would then be "Fee to counsel to *draw* bill"	3 3 0
		The fee to the counsel's clerk should either be allowed in all cases, or abolished. I incline to the latter, as I do not rightly understand upon what principle it can be defended, more especially as of late the clerks have endeavoured to make 5*l.* per cent. the scale of their fees on all fees above 4 guineas.	
Attending him	0 6 8	There appears no objection to this	0 6 8
Close copy bill as settled, fo. 60	1 0 0	This should be allowed in all cases, the draft being seldom fit for use, and the parties, in most cases, requiring a copy for perusal	1 0 0
Ingrossing bill	1 10 0	There appears no alteration neces-	
Parchment	0 10 0	sary in these	2 0 0
Paid filing	0 7 4	Whilst the present system of the Six Clerks' Office remains, there is no very great objection to this fee; but it is much to be desired that an alteration should take place by substituting an office where bills should be filed upon payment of a small fee—say 1*s.*—which would be fully adequate to support it, the only duties being to file, index, and make office copies; for which latter the charge should be moderate	0 1 0

	Present Charge. £ s. d.		Proposed Charge. £ s. d.
Attending to file bill		A fee of 6*s.* 8*d.* should be allowed for this, as an actual attendance is made, and it is an important step in the cause	0 6 8
Drawing precipe for subpœna, attending to bespeak, and for same	0 6 8	There is no objection to this, as a precipe is drawn, and two attendances are made	0 6 8
Paid for subpœna	0 3 0	The 2nd of the New Orders, which was made with a view of accelerating the servive of subpœnas, has entailed an additional expense on the suitors unnecessarily, as one subpœna containing all the defendants would have been sufficient, if copies of it were allowed to be served on the parties	0 3 0
Writing to correspondent, with instructions to serve same	0 3 6	These appear reasonable, but the latter should not exceed 1*s.* per mile and postages, and should always be sent to the nearest solicitor to the parties.	0 3 6
Paid his charges	0 11 6		0 11 6
Term fee, clerk in court and solicitor	0 16 8	The allowance of 6*s.* 8*d.* to the clerk in court might be got rid of, if a more simple plan was adopted than the present practice. The allowance to the solicitor is reasonable, for he has much trouble during the progress of a suit, for which he is unable to charge	0 16 0
Letters and messengers	0 5 0	This is certainly not too much in any case, and in many is far below the expenditure; as between party and party, perhaps it is better to allow always the same; but as between solicitor and client, I should prefer the actual outlay being charged	0 5 0
Trinity Term.			
Term fee, clerk in court and solicitor, and letters (order for time served)	1 1 8	This (as at present is done) should only be allowed when proceedings have actually been taken during the term	0 15 0
Michaelmas Term.			
Paid for attachment	0 7 2	A charge of 9*s.* or 10*s.* would adequately remunerate the solicitor were he allowed to issue this writ in the same manner as bills of Middlesex are now issued, upon leaving a precipe with the officer, and on payment of a small fee	0 10 0
Fee thereon	0 6 8		
Warrant and messenger	0 3 6	There appears no objection to these.	0 3 6
Letter to officer, with instructions	0 3 6		0 3 6
Paid him searching after defendant, postages, &c.	1 1 0	This should be allowed according to the circumstances; say not less than 10*s.* 6*d.*, and not to exceed 2*l.* 2*s.*	1 1 0
Term fee, &c.	1 1 8	These have been before observed upon	0 15 0
Hilary Term.			
Attending sheriff for return to attachment	0 6 8	There appears no objection to these	0 6 8
Paid for return	0 2 0		0 2 0
Attachment with proclamations	0 11 6	The same observations apply to this as to the previous attachment	0 10 0
Fees thereon	0 6 8		

* The fee for a letter, it is contended, ought generally to be 5*s*

	Present Charge. £ s. d.		Proposed Charge. £ s. d.
Warrant and messenger	0 3 6	There is no objection to these.	0 3 6
Letter to officer, with instructions	0 3 6		0 3 6
Paid him proclaiming defendant at —— church, and journey	0 10 6	There is, perhaps, no objection to these, if the present practice be continued; but as a more simple mode might be devised of giving the defendant notice, it should be adopted, and the expense lessened—say one-half	0 15 0
The like at —— church	0 10 6		
The like at —— church	0 10 6		
Term fee, letters, &c.	1 1 8	*Antè*	0 15 0
Easter Term.			
Paid for return to last writ	0 2 0		
Commission of rebellion	1 2 10		
Letter to officer, with instructions	0 3 6		
Paid officer for journies, &c.	1 3 6	There is no very great objection to these charges on the present system, but surely a more simple and less expensive method might be adopted; at all events, if the solicitor issued the process, and the sheriff executed it, a saving of at least 7*l.* or 8*l.* might be effected. Say therefore	7 19 6
Instructions to counsel to move for serjeant at arms	0 2 6		
Fee to counsel	0 10 6		
Attending him	0 6 8		
Paid for order and entry	0 3 6		
Several attendances on serjeant at arms appointing him to go	0 6 8		
Paid serjeant at arms his fees, and for return	10 11 2		
Attendance to pay him, and get return	0 6 8		
Instructions to counsel to move for sequestration	0 2 6	It is submitted that all orders of course are unnecessary, and that a notice from the solicitor would answer every purpose; if this were done, and the solicitor allowed to issue the writ, the expense would not exceed	0 15 0
Fee to him to move	0 10 6		
Attending him and court	0 6 8		
Paid for order and entering	0 3 6		
Attending bespeaking writ of sequestration	0 6 8		
Writ of sequestration	0 18 2		
Term fee, letters, &c.	1 1 8	*Vide antè*	0 15 0
Trinity Term.			
Paid for office copy answer of defendant A.—fo. 20	0 16 8	If the present system were altered, 2*d.* per folio would be an adequate remuneration for office copies[a]	0 3 4
Close copy	0 6 8	This should be allowed in all cases, as it is always made either for the country or the parties	0 6 8
Term fee, letters, &c.	1 1 8	*Antè*	0 15 0
Michaelmas Term.			
Attending to strike commissioners' names to take answer of defendant B.—6*s.* 8*d.*		This is not allowed at present, but it is submitted it should be, as considerable trouble is had in procuring the names, attending, &c. in most cases	0 6 8
Paid for office copy answer of defendant B.—fo. 40	1 13 4	See observations above.	0 6 8
Close copy	0 13 4		0 13 4
Term fee, letters, &c.	1 1 8	*Antè*	0 15 0
Hilary Term.			
Abbreviating bill and answers, fo. 120	2 0 0	This should be disallowed (more particularly if close copies were allowed in all cases) as it is almost an imaginary charge; it would be better even to allow a full copy of the pleadings, as the expense would be less[b].	

[a] The charge of 4*d.* per folio does not appear unreasonable, including the responsibility for accurate examination. The present charge is 10*d.*—Ed.

[b] It would perhaps be better that counsel should always have full copies of the pleadings.

	Present Charge. £ s. d.		Proposed Charge. £ s. d.
Fair copy for counsel, 12 sheets	2 0 0	This should be substituted for the preceding item	2 0 0
Fee to counsel to advise on evidence, and clerk	2 4 6	There is no objection to these, except the clerk's fee, which has been before observed upon.	2 2 0
Attending him	0 6 8		0 6 8
Instructions to counsel to move to amend, by adding ——— as a defendant	0 2 6	This being an order of course, might be dispensed with, and the plaintiff allowed to amend on giving a note to the defendant, which would answer all the purposes of the present order; I would therefore substitute for these charges, "Drawing notice of amending bill, copy, and service"	0 4 0
To him to move	0 10 6		
Attending him and court	0 6 8		
Paid for order and entry	0 3 6		
Two copies and service	0 4 0		
Drawing precipe for subpœna for defendant ——— attending to bespeak, &c.	0 6 8	See previous observation as to expense of subpœnas.	0 6 8
Paid for subpœna	0 3 6		0 3 6
Service thereof	0 5 0	There is no objection to this	0 5 0
Term fee, &c.	1 1 8	This has been before observed on	0 15 0
Easter Term.			
Drawing amendments to bill, fo. 10	0 10 0	"Drawing statement as instructions to counsel to draw amendments" should be substituted, being in accordance with the fact, and would rarely exceed the amendments in length	0 10 0
Fee to counsel to settle, and clerk	1 3 6	"Fee to counsel to draw amendments" should be substituted	1 1 0
Attending him	0 6 8	There is no objection to this	0 6 8
Paid clerk in court amending bill	0 13 4	If the solicitor were allowed to make the amendments on the record (which he generally does), this might be reduced to	0 6 8
Term fee, &c.	1 1 8	*Ante*	0 15 0

[*To be continued.*]

SUGGESTIONS FOR THE IMPROVEMENT OF THE COMMON LAW PRACTICE.

1st, No defendant (except a prisoner), if he appears in person, should be allowed to plead, without an affidavit annexed, that he is advised and believes he has a good defence to the whole, or some part of the plaintiff's demand.

2dly, If after such plea, no sufficient defence be offered at the trial, then the defendant (if in person) to be liable to double costs.

3dly, With a view to further discourage, as much as possible, inducements to defences to actions for small amounts, if the defendant shall let judgment go by default (in actions where the first judgment is only interlocutory), he be not merely intitled, as now, to defend upon the writ of inquiry; but unless the plaintiff recover, *by evidence*, forty shillings damages, he shall not be intitled to costs; but in such case, the defendant intitled to costs against the plaintiff. It sometimes happens, that upon executing a writ of inquiry, the plaintiff is unable to prove, to the satisfaction of the jury, *any part* of his demand; and yet the jury are bound to give a verdict for some amount, and the defendant is liable to all the costs.

4th, Proceedings in debt on simple contracts to be abolished.

5th, As a further argument in favour of these suggestions, and to justify them, allow me to observe, that I take it the act, and particularly the 11th sec., is framed with a view to discourage and prevent unnecessary delays and expense. Further, let me direct attention to the great number of undefended causes, openly known and admitted to be such, appearing in the lists at every sitting; and how many a plaintiff, in consequence of the present facility given to a defendant to plead, is forced, unnecessarily and unwillingly, either to submit to pay the defendant's no inconsiderable costs (even out of pocket) attending a *non pros.* for not entering the issue, judgment as in case of nonsuit for not going to trial, or to try his undefended cause at a like more enormous expense, which probably the defendant will never pay. The slight punishment inflicted

by the Insolvent Court on a defendant, for availing himself of the temptations now allowed to harrass the plaintiff, by pleading without having any defence, operates but very partially, if at all, in preventing the evil.

The Sheriff's Court might easily be rendered a very adequate and competent court, and render it unnecessary to create any new court. The only improvement required, is a better method of impannelling the juries. To remedy this, I would adopt similar practice and process as is now used in the courts at Westminster. Moderate delay may, in many instances, be justifiable, and essentially beneficial, as many defendants, by means of it, are enabled to effect arrangements; whereas too speedy judgment and execution might destroy credit in trade, and bring immediate ruin; but any period of delay deemed necessary, might be easily accomplished, by giving the defendant a certain number of days between each proceeding.

It would be desirable to abolish the very heavy fees now necessarily paid out of pocket on trials—*remanet* fees, &c. &c.; and the New Rules, for carrying the act into operation, should direct, that all records of causes once entered for trial, shall remain until tried, without incurring the heavy fees now paid for repassing the record, and fresh jury process: also, that *subpœnas* once served shall remain in force, without re-sealing and fresh service, until the cause be tried, though it may stand over from one sitting to another; for it often happens, that an unwilling witness avoids fresh service of the *subpœna*, and thereby justice is thwarted. . . . . P.

UNIFORMITY OF PROCESS ACT. No. III.

The fifth section of this act provides, "that upon the return of *non est inventus* and *nulla bona*, as to any defendant against whom such writ of *distringas* as hereinafter mentioned shall have issued, whether such writ of *capias* or *distringas* shall have issued against such defendant only, or against such defendant and any other person or persons, it shall be lawful, until otherwise provided for, to proceed to outlaw or waive such defendant by writs of *exigi facias* and proclamation and otherwise, in such and the same manner as may now be lawfully done upon the return of *non est inventus* to a *pluries* writ of *capias ad respondendum* issued after an original writ: Provided always, that every such writ of *exigent* proclamation, and other writ subsequent to the writ of *capias* or *distringas*, shall be made returnable on a day certain in term, and every such first writ of *exigent* and proclamation shall bear *teste* on the day of the return of the writ of *capias* or *distringas*, whether such writ be returned in term or in vacation; and every subsequent writ of *exigent* and proclamation shall bear *teste* on the day of the return of the next preceding writ, and no such writ of *capias* or *distringas* shall be sufficient for the purpose of outlawry or waiver, if the same be returned within less than fifteen days after the delivery thereof to the sheriff or other officer to whom the same shall be directed."

Previous to these enactments, the writ of *exigent* and proclamation, and subsequent process, were returnable on general return days in term, and not on days certain. It was necessary that a provision on this point should be made, because 1 W. 4. c. 3. § 2, making writs usually returnable on general return days, returnable on days certain, only applied to writs in use at the time of passing that statute.

Another difference may be observed, as to the days on which process under this act, in outlawry, may be made returnable. By 1 W. 4. c. 3. § 2, writs usually returnable at the time of passing that act on general return days, might "be made returnable on the third day exclusive before the commencement of each term, or on any day not being Sunday, between that day and the third day exclusive, before the last day of the term." The present act requiring the writs in process to outlawry to be made returnable "on a day certain in term," they cannot be made returnable on any of the three days contemplated by 1 W. 4. c. 3. § 2, before the commencement of the term. For those three days have been holden, in the case of *Doe* v. *Roe*, 1 Dowl. Prac. Rep. 79, not to be part of the term. That case was recognized in the last term by Mr. J. *Patteson*, in the case of *Price* v. *Hughes*. As, however, there is no restriction in the present act as to what day in term may be a return day, it is conceived, that any of the writs in process to outlawry might be made returnable on any of the three last days of the term.

There is no exception, it will be seen, however, as to Sunday, although there is such an exception in the above cited act. As an original might have been made returnable on a Sunday, so it might be supposed that the *exigent* and subsequent proceedings might also be made returnable on a Sunday. But as the words "'on a day certain in term," must be presumed only to be intended to place process to outlawry on the same footing as other process pre-

visously returnable on a day certain in term; and as a *Bill of Middlesex*, or a *latitat*, which are returnable on a day certain in term, could not be made returnable on a Sunday or other *dies non juridicus*, it may also be presumed, that the legislature intended that such process should not be made returnable on a Sunday. It is, however, clear, that such process might be made returnable on any of the days except Sunday between the Thursday before, and the Wednesday after Easter day, when those days fall within Easter term; for the Court of King's Bench has decided, in the case of *Lilly* v. *Gamperts*[a], that a *latitat* might be made returnable on any of those four days. A difficulty will, however, arise in those cases where the term commences on a Sunday, in consequence of the day of the month provided by 11 G. 4, and 1 W. 4, c. 70, § 6, for its commencement falling on that day. For it has been decided, in the case of *Doe* v. *Rust*, 1 Dowl. Prac. Rep. 63, that the Sunday, in that case, is to be considered as the first day of the term. It will be necessary, therefore, in proceedings to outlawry, to be exceedingly careful in observing on what day of the week the first day of term will fall. The process may, in cases where it would fall on a Sunday, be made returnable on any subsequent day in the term.

The writ of *exigent* and proclamation is now to bear *teste* on the return day of the *capias*, or *distringas*, whether that be in term or vacation. Before, it bore *teste* on the *quarto die post* of the return. The same remark may be made as to subsequent writs. The *teste* could only have been in term time before this, as the previous writs were all returnable in term time.

The subsequent part of the section recasts similar provisions with respect to process under this act, to those which existed with respect to the former process.

In consequence of the operation of § 10 with this, some difficulty will arise in proceeding to outlawry. By § 10, "no writ, issued by authority of this act, shall be in force for more than four calendar months from the day of the date thereof, including the day of such date." The writ of *exigent* and proclamation, as process under this act, must be considered as a "writ issued by authority of this act;" and, therefore, it will remain in force only four months, inclusive of the day of the date. But it is to be made returnable on a day certain in term. Now, suppose a case, in which the writ of *exigent* and proclamation issues on the last day of Trinity Term, which cannot, by the operation of 11 Geo. 4, and 1 W. 4, c. 70, § 6, and 1 W. 4, c. 3, § 3, be later than the 16th June, it will, by the operation of § 10 of this act, be defunct on the 16th October; but by § 5, it must be made returnable, and consequently be returnable, on a day certain in term. The nearest term to the 16th October, will be Michaelmas term; but that does not commence till the 2d November. It cannot, therefore, be made returnable in that term, since the four months have elapsed. Such a writ, therefore, cannot be returned at all. For the sheriff being bound to obey the exigency of the writ, could not be called upon to return it in a term, as of that term, when the writ was not returnable in that term. No proceedings could be had against the sheriff for not returning such a writ, supposing it to have been made returnable in Michaelmas term, since it would be an illegal writ, it being made returnable more than four months after its issue. The difficulty would not be cured by making the writ returnable on the 16th October, and then not ruling the sheriff to return it until Michaelmas term, because the writ would not then be made returnable in Michaelmas term.

In all cases, writs of *exigent* and proclamation, issuing as by § 10 of this act, they can only be in force for four months, there must be an *exigent de novo*, with an *allocatur* clause; because there never can be five county courts between the *teste* and return of it.

Now it may be ingeniously urged, in order to make the provisions of § 10 consistent with those of § 5, that § 10 does not apply to proceedings in outlawry, but merely to writs of summons and *capias*, because those words are to be found in that section. The provision of the section is this, "that no writ issued by authority of this act, shall be in force for more than four calendar months from the day of the date thereof, including the day of such date; but every writ of summons and *capias* may be continued by *alias* and *pluries*, as the case may require, if any defendant therein named may not have been arrested thereon, or served therewith." Now, the plain meaning of those words is, that none of the writs issued by the authority of this act shall remain in force more than four months; but, as, if the provision were left without an exception in favor of summons and *capias*, the plain-

[a] 4 L. O. 26.

tiff's right to proceed by *alias* and *pluries* would be taken away, and he must, on every occasion, issue a fresh summons or *capias*, without reference to any former writ issued, that exception was introduced. But the provision with respect to writs of summons and *capias* is only in their favor, and does not interfere with the general rule with respect to other writs issued under the authority of this act. There was a necessity for introducing this limitation as to the duration of writs, because there is no other limitation as to their duration contained in the act or in the schedule, except in the case of writs of *distringas*, summons, and *capias*. Those, by the notices at the foot of each, are made to last only until the following term, or for four months. Unless, therefore, there were this limitation introduced, as to the duration of writs issued under the authority of this act, they would continue perpetually in force, except in the case of summons, *distringas*, and *capias*. It will, perhaps, be said, that the fact of the duration of those writs being limited in the notices at the foot of the forms of those writs in the schedules, shews, that the legislature intended that this provision with respect to the limitation of duration, should extend to these writs only. But, first, such a provision would not be necessary in their case, since the limitation is contained in the notices at the foot of those writs; because the schedule is part of the act, and would, of course, operate with the same force as the notice to the defendant at the foot of the writ of summons, that the plaintiff will appear for him in default of his appearance, according to the exigency of the writ. And, secondly, if the provision only applies to writs of summons, *distringas*, and *capias*, then all other writs issued under this act may remain in perpetuity.

Again; it may be observed, that as § 10. is the later provision in the statute, it must be taken to express the intention of the legislature, according to the principle, that where two provisions in the same statute are repugnant, the latter shall control the former. [a]

But in the construction which the courts will put on this act of parliament, it is probable, that in order to make the provisions work together, the words in § 10, "writ issued by the authority of this act," will be held only to apply to the new writs created by it; and that the other process founded upon these writs, is to remain subject to the same rules as existed previous to the passing of this statute.

The sixth section empowers plaintiffs to proceed to outlawry on judgments obtained under this act, in the same manner as on judgments obtained in actions commenced by original; and renders such proceedings liable to be vacated or set aside in the same manner. The same observations will here apply, as to *exigents* issued more than four months before Michaelmas term: but as no proclamation is in such case necessary, there need be no *allocatur exigent*.

Section 7. empowers the Chief Baron of the Exchequer to appoint a person holding some other office in that Court, to perform the duties of a Filazer, Exigenter, and Clerk of the Outlawries in that Court. Before this, the Court of Exchequer had no power to outlaw or waive, as it had not power to issue an original writ. This power is now granted to it.

By § 8. it is provided, "that when it shall be intended to detain, in any such action, any person being in the custody of the Marshal of the Marshalsea of the Court of King's Bench, or of the Warden of the Fleet Prison, the process of detainer shall be according to the form of the writ of detainer contained in the said schedule, and marked No. 5.; and a copy of such process, and of all indorsements thereon, shall be delivered to the said Marshal or Warden to whom the same shall be directed, and who shall forthwith serve such copy upon the defendant personally, or leave the same at his room, lodging, or other place of abode; and such process may issue from either of the said Courts; and the declaration thereupon shall and may allege the prisoner to be in the custody of the said Marshal or Warden, as the fact may be; and the proceedings shall be as against prisoners in the custody of the Sheriff, unless otherwise ordered by some rule to be made by the Judges of the said Courts."

These provisions will considerably facilitate and shorten the mode of detaining a prisoner in custody of the Marshal of the King's Bench, or of the Warden of the Fleet, and remove the necessity of bringing up prisoners by *habeas corpus*, for the purpose of charging them in execution on fresh causes of action.

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[a] See Fitzgibbon, 195; Bac. Ab. tit. "Statute;" Dwarris on Statutes, Part 2, 661. The same principle was recognized in *Rex* v. *The Justices of Middlesex*, 1 Dowl. Prac. Rep. 116.

SUPERIOR COURTS.

KING'S BENCH.—PRACTICE COURT.

NOTICE OF TRIAL.

A notice of trial at "Guildhall, Westminster," the Court of King's Bench not sitting there, is defective, if the defendant swears that he was misled by it.

Archbold shewed cause against a rule for setting aside the verdict and judgment in this case, with costs, on the ground of irregularity. The irregularity complained of is in the notice of trial. The notice of trial was in these terms: "In the King's Bench, Hilary Term, 2 W. 4. *John Cross* v. *James Lang*, a prisoner. Mr. James Lang,—Take notice of trial in this cause, which will be tried as an undefended cause, at the Sittings for the County of Middlesex, at the Guildhall, Westminster," The notice of trial for "Guildhall, Westminster," is said to be irregular, because no sittings were going on at the Guildhall. But it being notorious to every one that the Court of King's Bench does not sit at Guildhall, the defendant could not have been misled. Besides, he has not sworn that he had delivered a brief, employed an attorney, or taken out a *habeas corpus* to bring himself up from custody to defend his cause.

Platt, *contrà*, referred to the affidavit of the defendant's son, who stated that he had come on the day mentioned in the notice of trial to Guildhall, Westminster, had found no Court sitting, and had been informed there that no sittings would take place until several days after. This information, the defendant himself swore, had caused him to abstain from making any further attempt to defend the cause. The Court of King's Bench did, for a considerable time, sit at Guildhall, Westminster, and therefore a professional man, much more an unprofessional man, might be misled.

Taunton, J.—I yield to this objection with very great reluctance. It is important to preserve forms. This defect is not a mere silence as to the place of trial. It is a misdescription of it, and the defendant swears he was misled by it. The rule must therefore be absolute.

Rule absolute.—*Cross* v. *Lang*, E. T. April 26th, 1832. K. B. P. C.

LIST OF CAUSES.—NISI PRIUS.

The Court in banc has no jurisdiction over the cause list at nisi prius.

Hutchinson shewed cause against a rule for restoring a cause to Lord *Tenterden's* paper, out of which it had been struck. He submitted that the Court had no power to interfere with the proceedings of the Judge at *Nisi Prius* in such a matter.

Comyn, *contrà*. The object of the present application is to enlarge a rule for judgment as in case of a nonsuit.

Taunton, J.—I don't know that the Court has any jurisdiction over the list of causes at *Nisi Prius*. It is exclusively in the power of the Judge who tries the causes. I have repeatedly refused such an application at Chambers. I can't interfere.

Rule discharged.—*Jacob* v. *Rule*, E. T. April 28th, 1832. K. B. P. C.

BANKRUPTCY COURT OF REVIEW.

TWO FIATS.—SUPERSEDEAS.

The Court will not supersede a second fiat (*issued on the first being as a matter of course superseded for want of prosecution*), *on the ground of a want of good faith by the petitioning creditor for the second* fiat.

The Court will not allow a fiat *to be dealt with.*

The prosecution of a fiat *is a matter between the petitioning creditor and the public.*

The petitioning creditor for a *fiat*, which had been superseded for want of prosecution, petitioned that the *supersedeas* might be annulled, and that a second *fiat*, which had been obtained by another creditor, the respondent, might be superseded, and the proceedings under it declared void.

On the 26th of April, 1832, the petitioner caused a *fiat* to be issued against the bankrupt; but proposals having been subsequently made by the bankrupt, several meetings of the creditors were held in the month of May, at which the respondent was present, and adjournments took place with his assent; a final meeting was held on the 7th of June, and the evidence varied, whether he was then an assenting party to a negociation for arrangements; but the Court having decided that that was immaterial, it is not necessary to go into a detail of the affidavits. On the 8th of June the respondent's solicitor sent instructions for superseding the former *fiat*, and the issuing of another *fiat* on his own petition. On the 9th June the former *fiat* was, as a matter of course, superseded, and the second *fiat* issued. This petition prayed that the second *fiat* might be superseded, on the ground that good faith had not been observed.

Mr. *Montagu* and Mr. *Koe* for the petitioners.

Mr. *Swanston* and Mr. *Russel* for the respondents.

The Right Honorable *Thomas Erskine*, C. J.—No case has been made which calls for the interposition of the Court; it has not been pretended that the respondent is not a *bonâ fide* creditor, or that the estate cannot be duly administered under the *fiat* he has issued; it is asserted that the first *fiat* was issued at the request of the bankrupt, and for his benefit; and it is also asserted, that the solicitor sued it out on the application of the bankrupt, and that the petitioning creditor did not employ his own solicitor, but that he adopted the bankrupt's solicitor. Now what was the first step taken by the solicitor, whose duty it was to look to the interest of the creditors—it was to take steps favourable to the bankrupt; it is obvious that the object of this petition was a compromise

with the creditors, and not a distribution of the estate under the bankrupt laws; but it is said that the last act of parliament, with respect to concert, meets that objection, and certainly concert would not be a ground. Yet the Court is called upon to set aside the second *fiat*, in order that the solicitor to the first *fiat* may prosecute that first *fiat*, which he took out for the benefit of the bankrupt. Lord Loughborough made an order, that after twenty-eight days a commission should be supersedeable on the application of a creditor; but this is said to place only a discretion; and it has been argued, that this petition ought to be heard as an application to supersede the first *fiat*; but I think differently on the latter point. Satisfied as I am, that composition was the object in this petition, I am of opinion that this court cannot interfere. In the case of *ex parte Lake, in the matter of Evans*, 1 G. and J. 361, it was held, that a commission is a proceeding for the immediate administration of the estate, for the benefit of all the creditors; and the party suing out the commission is bound to reasonable diligence: and the public, as well as the creditors, have an interest that there should be no delay in the prosecution of a commission, because such delay permits the bankrupt to remain in apparent credit. It is not to be made a matter of bargain, how long a commission shall be held to hang over; that is a question, not with the creditors but with the public. The only ground on which this petition is presented is, that inasmuch as the petitioning creditor for the second *fiat* sued it out against good faith, the Court will not permit him to carry it on. Now, without entering into that question, it is enough to say, that on the 16th of May the time for opening the first *fiat* had expired, and had elapsed by the conduct of the petitioning creditor himself, by his voluntary act; then by the operation of the law any other creditor might have superseded it. Now as the bankrupt's estate is not at all interested in our interference, I am of opinion that this petition ought to be dismissed, and with costs.

His Honor Sir *John Cross.*—Were the question only between two petitioning creditors, I could only be of opinion, that the *second fiat* was sued out under bad faith, and that the *first fiat* ought to be superseded. Both the petitioning creditors for these *fiats* were actually appointed inspectors, yet the day after a meeting, &c, who petitioned for the *second fiat*, went and sued out that second *fiat*. But I am bound to consider whether it will be of any advantage to the creditors to set aside the second *fiat* and set up the first; it would be a bold measure to set aside the *supersedeas* of the Chancellor; I therefore think we are bound to sustain the second *fiat*, no advantage being to result from giving effect to the first *fiat*, which was confessedly sued out at the instigation of the bankrupt. I think it is a fairer course to let the second *fiat* go on; but I would, if I could, order the petitioning creditor of the second *fiat* to pay the costs.

His Honor Sir *George Rose.*—I coincide with the rest of the Court. The conduct of the petitioning creditor for the second *fiat* has nothing to do with the application. The second *fiat* can only be attacked upon the ground that the creditors will be injured by its proceeding. The 14th section provides that the petitioning creditor shall prosecute the commission to the appointment of assignees; but the petitioning creditor made use of the first *fiat* to effect a composition, which would have been useless unless all the creditors assented. In a case before Lord Eldon, he was struck with the mischief of a commission being taken out and dealt with; and now, since the late provision, as to concert, the mischief would be greater. The Court will not stop the adjudication, although the bankrupt apply to the Court suggesting he was solvent and could pay twenty shillings in the pound; all the Court has done has been to delay the insertion in the *Gazette*; nothing could be more mischievous than that a commission should be allowed to be dealt with. The petition must be dismissed, and, according to the usual practice, with costs.—*Ex parte Anger, in re Wood*, 22d June, 1832. B. C. R.

NOTES OF THE WEEK.

House of Lords.

CONTEMPTS IN ECCLESIASTICAL COURTS.

This Bill has been read a third time, and passed.

FINES AND RECOVERIES.—LIMITATION OF ACTIONS.—INHERITANCE.—CURTESY.

Waiting for the second reading.

REMEDIES AGAINST THE HUNDRED.

Waiting for Committee.

SENTENCE OF DEATH.

Waiting for report.

ANATOMY.

Waiting for the third reading.

House of Commons.

SEWERS.

Deferred till Wednesday 25th July.

PRESCRIPTION.—TITHES' PRESCRIPTION.—BANKRUPT ACT AMENDMENT.

Waiting for the third reading.

WITNESSES IN EQUITY.— DOWER.— EXCHEQUER COURT OFFICERS.— LUNATICS' COMMISSIONS.

Waiting for Committees.

SHERIFFS' EXPENSES.

Waiting for the third reading.

COURT OF CHANCERY.

A Bill to diminish the expense and delay of Proceedings in the High Court of Chancery in certain cases, has been ordered to be brought in by Mr. Spence and Mr. William Brougham. The former gentleman, the author of this Bill, had some time ago printed his proposed alterations, the substance of which we laid before our readers on the 3d of June (p. 65, *ante*). The cases to which the Bill is intended to apply, are principally those of the administration of personal estates, legacies, &c.

The other Bill, of which we also gave an abstract (p. 7, *ante*), will be brought into the Upper House by the Lord Chancellor, as we stated on the 2d of June last. We hope next week to advert to both those measures of Chancery Reform, in a considerable part of which we concur; but of several of the proposed changes we question the utility.

SITTINGS AT THE ROLLS.

The *Master of the Rolls* will proceed with Causes, Further Directions and Costs, and Exceptions, as they stand in the book, until Wednesday the 18th instant.

On Thursday the 19th, and on the following days, his Honor will take Further Directions and Costs and Exceptions only, until such as are then entered shall be disposed of, and will then take Causes until the last Seal.

General petition day on Wednesday the 27th instant, at 11 o'clock.

ADJOURNMENT OF THE COURT OF EXCHEQUER.

The Lord Chief Baron will not sit again in Gray's Inn Hall, till Monday the 29th of October next.

ACCOUNTANT-GENERAL'S OFFICE IN CHANCERY.

The Accountant-General's Office will be closed from Saturday the 25th day of Aug. next, till the first General Seal before Michaelmas term.

No purchase, sale, or transfer, will be made by the Accountant-General, unless the order and request, or Registrar's certificate, be left at his office on or before Saturday the 18th day of August next; and no order for payment of any money, out of cash which may be then in Court, will be received at the Accountant-General's Office after Tuesday the 21st day of August.

YORK ASSIZES.

These Assizes, which were fixed for this day (the 14th instant) have been postponed. The day on which they will commence will be notified. We are informed at the Judges' Chambers, that the prevalence of the Cholera at York is the cause of the postponement.

ANSWERS TO QUERIES.

LAW OF PROPERTY AND CONVEYANCING.

LEGACY. P. 112, *ante*.

This case appears partly, if not entirely, decided by a portion of Lord *Mansfield's* judgment, cited in 1 T. R. 287 (*Bye* v. *Dickson*), where it is said, "But where money has been paid under a mistake, which there was no ground in conscience to claim, the party may recover it back again, in an action for money had and received to his use." Now, in the question put by "Inquirer," the executor was evidently *under a mistake* respecting the solvency of the deceased's estate; *nor was he in conscience bound* to advance any money to the annuitants, and take upon himself the risk of the estate being competent to repay him. Such being the case, and considering the above extract in his favour, I conceive he would have good ground of action for money had and received by the annuitants. R. B.

BEQUEST.—MAINTENANCE. P. 112, *ante*.

In the will alluded to by H. B. A. there is of course no clause authorizing the executors to lay out any part of the property bequeathed by the testator to his grandchildren, towards their maintenance and education, in case they could not obtain it elsewhere; and taking such to be the fact, I apprehend the testator's son cannot support his claim; for I consider, that if a man pays what he would not be *compelled to do by law*, but only considers himself bound in *equity and good conscience*, he cannot maintain an action for money paid by him under such circumstances. R. B.

STAMP ACT.—LEASE FOR A YEAR. P. 127, *ante*.

In answer to the query of W. R. C., I do not think a second stamp on a lease for a year,

which runs to upwards of thirty folios, is necessary. A *second* stamp, on a *lease for a year*, it appears, only has relation to the consideration, and not to the quantity of folios. The Stamp Act is silent on this point, which is a strong presumption that *one* stamp is sufficient; at all events, I think your querist would be quite safe by having *only one*.

X. Y. Z.

QUERIES.

COMMON LAW.

EXECUTION.—BANKRUPTCY.

An execution on a verdict or judgment by default in an action, is levied on a *Monday*, an act of bankruptcy is committed on the *following day*, upon which a commission issues, and the defendant is declared a bankrupt before the expiration of two months, from the time of levying;—Is the plaintiff in such action, or the assignees under the bankruptcy, entitled to the produce of the levy, the act of bankruptcy being *subsequent* to the levy, and not *prior*, as stated in 6 G. 4. c. 16. § 81.

A Constant Subscriber.

ASSESSED TAXES.—COLLECTOR.

Can a collector be called upon to shew the act of parliament under which he demands the above taxes? Great imposition is practised in the assumption of powers by them, not warranted by the act. Has a tax-payer no remedy, but an appeal to the commissioners, when aggrieved; or can a collector be held personally responsible for any deviation from the line of duty; and if yea, then in what way?

H. H. P.

SHAM PLEA.

Will the Court, in the case of a plea being put in for the mere purpose of delay (but by which no unnecessary expense is incurred by the opposite party), compel the defendant to verify it; and in default thereof, will the proceedings be set aside with costs? R. B.

LAW OF LANDLORD AND TENANT.

RENT.—SUB-TENANT.

A. agreed to assign to *B.* his interest in certain premises, of which *B.* held a lease; and the terms being concluded, *B.* paid 15*l.*, as a deposit, and a day was fixed for *B.* entering into possession. *A.* sent a letter to his landlord, informing him that he had let the premises, and that if he would call on a certain day his rent would be paid; the landlord, however, did not call; the assignment was executed, *A.* at the same time assuring *B.* that the rent was paid; but it has since been ascertained, that three quarters rent is due to the landlord in respect of *A.*'s tenancy. Is *B.* liable to the payment of this rent? J. S.

MISCELLANEA.

SIR WALTER SCOTT ON THE CODE NAPOLEON.

Considered as a production of human science, and a manual of legislative sagacity, the Code may challenge general admiration, for the clear and wise manner in which the axioms are drawn up and expressed. There are but few peculiarities, making a difference betwixt its principles and those of the Roman law, which has, in most contracts, claimed to be considered as the mother of judicial regulation. The most remarkable occurs, perhaps, in the articles regulating what is called the Family Council; a subject which does not seem of importance sufficient to claim much attention.

The civil code being thus ascertained, provision was made for its regular administration by suitable courts; the judges of which did not, as before the Revolution, depend for their emoluments upon fees payable by the litigants, but were compensated by suitable salaries, at the expense of the public. As France does not supply that class of persons, who form what is called in England the Unpaid Magistracy, the French Justices of Peace received a small salary, of from 800 to 1800 francs. Above them in rank came Judges in the first instance, whose salaries amounted to 3000 francs at the utmost. The Judges of the Supreme Tribunals enjoyed about 4000 or 5000 francs; and those of the High Court of Cassation had not more than 10,000 francs, which scarcely enabled them to live, and keep some rank in the metropolis. But, though thus underpaid, the situation of the French judges was honorable in the eyes of the country, and they maintained its character by activity and impartiality in their judicial functions.

The system of juries had been introduced in criminal cases, by the acclamation of the Assembly. Buonaparte found them, however, scrupulously restive and troublesome. There may be some truth in the charge, that they were averse from conviction, where a loop-hole remained for acquitting the criminal; and that many audacious crimes remained unpunished, from the punctilious view which the juries took of their duty. But it was from other motives than those of the public weal, that Napoleon made an early use of his power, for the purpose of forming special tribunals, invested with a half-military character, to try all such crimes as assumed a political complexion, with power to condemn, without the suffrage of a jury. This infringement of the most valuable political rights of the subject, was shewn in the trials of Georges, Pichegru, and Moreau. No jury would ever have brought in a verdict against the latter, whose sole crime was his communication with Pichegru; a point of suspicion certainly, but no proof whatever of positive guilt. Political causes being out of the field, the trial by jury was retained in the French code, so far as regarded criminal questions; and the general administration of justice seems to have been very well calculated for protecting the right, and punishing that which is wrong.

The Legal Observer.

VOL. IV. SATURDAY, JULY 21, 1832. No. XCII.

——— "Quod magis ad NOS
Pertinet, et nescire malum est, agitamus."
HORAT.

CHANGES IN THE LAW DURING THE PRESENT SESSION OF PARLIAMENT, 1831—1832.

No. II.

THE REFORM ACT, 2 W. 4. c. 45.

(*Concluded from page* 164.)

FOURTHLY, *As to proceedings at future elections.*—By § 58, in all future elections no inquiry shall be permitted at the time of the election, except as to the identity of the voter, the continuance of his qualification, and whether he has voted before at the same election; and an oath as to these points, but as to no others, may be administered; the register being taken as the sole criterion of the right to vote: but (§ 59.) persons excluded from the register by the barrister may tender their votes at elections, and the tender is to be recorded; but no scrutiny shall hereafter take place after an election.

The sheriffs of the divided counties are to fix the time, and preside at the elections, by themselves or deputies. (§ 61.) The polling is to commence at nine in the forenoon of the next day but two fixed for the election, except it happen on a Saturday or Sunday, and then it is to take place on the Monday following, at the principal place of election, and at each of the polling places; and such polling shall continue for two days only, for seven hours on the first day, and eight hours on the second day. By § 63, counties are to be divided into districts for polling; and in each district, a convenient place for taking the poll is to be appointed. At every contested election, a reasonable number of booths for taking the poll shall be erected at the principal place of election, and at each of the other polling places, and no voter shall be allowed to poll, except in the district where his property lies; § 64. And by § 65, provision is made for the safe custody of the poll books, and the final declaration of the result of the poll.

The poll for cities and boroughs shall commence on the day fixed for the election, or on the day next following, or at the latest on the third day, except any of these days shall be Saturday or Sunday, and then on the Monday following; the particular day to be fixed by the returning officer; and such polling shall continue for two days only, such two days being successive days, for seven hours on the first day of poll, and for eight on the second day of polling (§ 67). At every contested election, the returning officer shall erect different booths for different parishes of the city or borough, which booths may be situate in one place or different places, and shall be so divided, that not more than 600 persons shall vote at one compartment of a booth; and each person is to vote at the booth appointed for his parish or district.

By § 70, the returning officer may close the poll before the expiration of the time fixed, where the same might have been lawfully closed before the expiration of the time fixed; and in case of riot, the poll may be adjourned. By § 71, the candidates, or persons proposing a candidate without his consent, shall be at the expense of booths and poll clerks; but these expenses are limited by the act (§ 71.) Each booth shall be furnished with a true copy of the register of voters; and every deputy of a sheriff, or other returning officer, may administer oaths (§ 72).

By § 75, all election laws shall remain

in force, except where superseded by the act.

By § 76, any sheriff, or returning officer, who shall wilfully disobey the provisions of this act, may be sued in an action for debt for the penal sum of 500*l.*, or any less sum which the jury may see fit to award.

By § 77, writs, &c. are to be made conformable to the act.

Fifthly, *As to existing rights.*—Every person who before the act would have been entitled to vote, either for a county member, (§ 18,) or for any city or borough not included in schedule A, shall be entitled to vote in future elections, if he shall be duly registered; but all freemen created since the 1st of March, 1831, are excluded, except freemen in respect of birth or servitude; and no existing vote can be registered unless the voter have resided in the place for which he votes, or within seven miles thereof, six calendar months next previous to the 31st of July, in the year of registration (§§ 32, 33, and 35).

Provision is made as to particular existing rights, existing in Swansea, Loughor, Neath, Aberavon, Kenfig, New Shoreham, Cricklade, Aylesbury, and East Retford, by §§ 32 & 34.

Sixthly, *As to the next election.*—By § 80, it is provided, that in case the act for settling the boundaries of the places to return members under the Reform Act, shall not have passed on the 20th of June, 1832, the preparations for the first registry shall be deferred; but if the boundary act pass after that day, the period preparatory to, and connected with, the first registration, shall be settled by an order in council,—which has since appeared, dated the 12th of the present month.

LAW OF DEBTOR AND CREDITOR IN AMERICA.

We are induced, by the agitation of various questions relating to the law of debtor and creditor in this country, to continue our extracts from Mr. Vigne's work on America.

"The terms bankruptcy and insolvency are used indiscriminately, although the distinction is of course generally known and understood among lawyers. By the articles of the constitution, the general government is enabled to pass uniform laws on the subject of bankruptcy. No general bankrupt law has, however, been passed, although such a measure has been often contemplated. In the United States a proportion of the people, large beyond that of any other country, is engaged more or less in traffic of some kind or other in the course of the year, and the difficulty of coming to any equitable decision as to who may or may not be considered a bankrupt, has been the reason why no general law on the subject has been passed by the federal congress. The states likewise have the power of passing bankrupt laws; but they would only be productive of confusion, as they would not be allowed to have the effect of rescinding a contract between citizens of different states; the Supreme Court having decided that a discharge under the bankrupt or insolvent laws of one state, could not affect contracts made or to be executed in another. As a matter of necessity, the states have insolvent laws of their own, which are generally recognized and respected in all of them as far as they conveniently can be. In some cases the person only, not the debt, is released by them; in others, the debt is discharged, but future acquisitions by gift, devise, or descent, are liable, though not the produce of future industry. The whole law on the subject of bail in the United States is much the same as that of England. A debtor to the United States can only be released by obtaining a release under the United States' insolvent law. In order to be enabled to apply for a release under the insolvent laws of any particular state, a debtor must have resided in that state for a certain period, generally one year; and on the surrender of all property (if he has any), he obtains a discharge from prison, which is also a discharge from the debt itself, and as a personal discharge, is respected throughout the Union; but as a discharge *from* the debt, it often operates as such only in the state that grants the discharge. Between citizens of the same state it releases the debt as well as the person; between citizens of different states, or between a citizen and a foreigner, or between foreigners, the discharge depends on circumstances. If the suit be brought in the courts of any particular state, and the party has been released by the laws of that state, the debt is considered equally cancelled as if the controversy had been between citizens of the same state. If the debtor to the United States has applied for, and obtained the benefit of the United States' insolvent law, it can only be in cases where a judgment has been obtained against him, and he has been taken in execution. He must, however, remain in prison for thirty days, and surrender all his property, which he must swear does not exceed thirty dollars, over and above his necessary wearing apparel; for if he has property beyond that amount, he cannot obtain the benefit of this law. By this discharge, the person only is released, so that property subsequently obtained from any source is responsible. In all other cases of discharge, under the insolvent laws of individual states, before notice, the person or the debt are discharged (as mentioned above), but still with the reservation, that all property acquired by descent, gift, or devise, shall be subjected to execution, but not the future acquisitions of the debtor by other means."

IMPRISONMENT FOR DEBT.

"From the first of January, 1832, imprisonment for debt has ceased in the state of New York; the fact is, there is so much more false capital in the United States than in England, that a creditor is not often one dollar the richer for having put his debtor into confinement. The example, if it succeed, will probably soon be followed in Massachusetts, where there is a strong party in favour of a similar experiment. Whilst I was in that state, a meeting was held at Boston, to consider of its propriety; but the united arguments of many speakers, tended to prove nothing more than what was most probably acknowledged beforehand, by three-fourths of those who heard them, and into which all that can be said on the subject must ultimately resolve itself, namely, that the sufferings of an innocent debtor are highly unjust, and much to be lamented; but that it would be very objectionable to have no means of confining one whose conduct had been fraudulent. By the constitution of the state of Illinois, imprisonment for debt is disallowed, except in cases of fraud, or the refusal of the debtor to deliver up his property for the benefit of his creditors."

REVIEW.

The Act 2 *Will.* 4, *c. XLV. to amend the Representation of the People in England and Wales, with Notes and copious Index.* By A. E. Cockburn, Esq. Barrister at Law. Sweet, 1832.

An Examination into certain Errors and Anomalies in the Principles and Detail of the Registration Clauses of the Reform Act. Saunders and Benning, 1832.

The Act for the Amendment of the Representation of the People of England and Wales, 2 *W.* 4, *c.* 45; *with Notes and Tables.* By W. C. Rowe, of the Inner Temple, Barrister at Law. Saunders and Benning, 1832.

The Parliamentary Reform Act. By T. M. Rogers, Esq. Barrister at Law, 1832.

&c. &c. &c.

We shall no doubt have a swarm of books and pamphlets, and Notes, and Guides, on and to the Reform Act. We are sorry to see, we confess, for the respectability of the profession, how eagerly, if the slightest opening occurs, a host of professional men rush in to supply the demand, and struggle with each other for precedence. We could wish it were otherwise; for thus we are burdened with a heap of undigested and hasty productions, instead of enjoying the benefit of the deliberate reflection and labour of one or two.

Mr. Cockburn, we believe, was first in the field, or book-race; and he modestly admits, in his preface, that his notes are "precluded, from their brevity, from all pretensions of being of any considerable utility to the profession, except perhaps for the purposes of hasty reference;" and we can assure him that he is by no means mistaken in the estimate he has made of their merits. Thus, he describes a fee-tail as "an estate of inheritance to a man and certain inheritors, designated in the legal instrument by which the estate is conveyed and limited," (p. 10)—a definition sufficiently inaccurate, as it omits the great quality of an estate tail, the heirs of *the body* of the tenant; the "certain inheritors" might mean nephews just as much as sons or daughters. In p. 11 he says that sublessees and assignees of any underlease are not qualified to vote at all under the Reform Act; whereas the Act says, (§ 20,) that they shall not vote "*unless* they shall be in the actual occupation of the premises;"—which makes some little difference. Now we will not say that some of the notes are not better than these; but none of them appear to us to display much care or accuracy.

Mr. Chambers's pamphlet is directed to one part of the act, which he has examined with some acuteness. His principal objection to the Act is, that the registry is voluntary only, and that electors may thereby be deprived of their just rights by reason of not coming forward to register their votes. To this we can only apply the maxim *vigilantibus non, &c.*

The work of Mr. Rowe seems to us to be the best as yet before the public. It contains some useful tables; nevertheless it is by no means a complete treatise on the subject: still less so is that of Mr. Rogers. But as it is unusual to break butterflies on wheels, or kill flies with forty-pounders, we do not think it necessary to submit these productions to a detailed criticism. Mr. Rowe's appears to us the best,—which is not saying much in his praise.

SELECTIONS FROM CORRESPONDENCE.

No. IX.

PUBLIC STATUTES.

Mr. Editor,

The encouraging and ready manner in which

you inserted our last communication, has emboldened us to attempt another encroachment on your valuable space, for the purpose of suggesting the mode in which a new edition of the statutes might be published. It is simply thus: To leave out acts, or parts of acts, that are repealed; and by way of effecting this properly, to begin the series with the later acts, and so following in chronological order backwards. By this means, the more modern (and therefore more necessary) would be rendered available at once, and the difficulty of selection by the printer taken away. H., K., & W.

ATTACKS ON THE KING.

Sir,

YOUR article, in the number for the 30th of June last, on the law respecting Attacks on the King, has led to the question, whether, if the person now about to be tried for the attack upon his Majesty should be convicted of high treason, the King *can* pardon him, and commute the sentence to transportation for life? Indeed, it would seem that the whole question is, CAN the King pardon him? for the remainder of the proposition would, perhaps, follow as a necessary consequence. It is a question of some interest, because the weakness of the late attack, one by a disappointed, violent, ignorant drunkard, without coadjutor, and with no other feeling than what intense and brutal selfishness created, (in point of abstract principle, as to compassing, &c. the King's death, contemptible,) makes it a point of doubt with some, and I confess with myself, whether it can ever be a question of degree; and therefore, if the man is convicted of high treason, that he must suffer the severest penalty of the law. W.

NISI PRIUS ARREARS.

THE great arrear of causes at *nisi prius*, makes it again a question, How is it to be remedied? As there are now five judges to each of the three superior courts, might not one judge (taking it by rotation) sit constantly at *nisi prius*? If not constantly, say *four* days in every week, except during the assizes and holiday week. W.

DUTIES OF SHERIFFS.

Sir,

A bill having lately been brought into the House of Commons, for the regulation of the office of Sheriff, it has occurred to me to suggest that something might be done to curb the power which that officer has, of putting litigant parties to expense; for instance, on the return of mesne or other process, by which the sheriff is amongst other things directed, "that he have then (i. e. at the return thereof) there that writ," he should be bound to return *and file* such process, within a reasonable time after the return day, or be liable to an attachment without notice. As the practice now stands, the plaintiff in an action must first serve the sheriff with a rule to return the writ, or, in other words, with a rule to do that which he is directed by the writ to do; and if the process be a *fieri facias*, or other writ of execution, the costs of such rule fall on the plaintiff, and of course reduce the amount of the debt which he has recovered. In a late case, within my own knowledge, the sheriff levied under a *fi. fa.*; and when ruled to return it, his return was, that the goods remained in his hands for want of buyers; whereupon a *venditioni exponas* was issued, which was not returned until the plaintiff served a rule, and then he made the same return as to the *fi. fa.* The plaintiff, however, got his money, but had out of it to pay the expenses of these rules, and of the *vend. exp.*, amounting to 5*l.* and upwards. The debt in this case happened to be large, and the parties opulent; but these circumstances do not make the injustice towards the plaintiff less. Had the plaintiff been poor, and the debt small, the loss would have been very serious. J. K.

NEW RULES.—WARRANT OF ATTORNEY.—TAXING COSTS.

WHETHER the various changes which are now taking place in our laws and rules of practice will tend materially to benefit the public, which I presume is the object in view, I will not attempt to determine; but I think, in one instance where they have been altered, it will appear, that every alteration is not always an improvement;—I allude to the *new regulation*, as to taxing costs before issuing execution on a warrant of attorney. By the former practice, provided a warrant of attorney was not twelve months old, execution might be issued at any time, without the defendant being aware of the plaintiff's intentions; and in this consisted one of the principal benefits of this description of instrument; but now, by the new rules, although all the previous costs may be included in the instrument, it is necessary to give the defendant three days notice of *taxing the costs of the judgment*; thereby, in fact, informing him of the plaintiff's intention to issue execution, and enabling him to defeat his creditor, by assignment, or many other ways, which a dishonest debtor often resorts to. This I consider to be a very injurious regulation; and my object in writing this letter is, that public attention may be directed to it, with a view to its removal.

A SOLICITOR.

DECLARATION MONEY.

Sir,

CAN you inform me what becomes of the fees paid on taking declarations out of the office in the Court of King's Bench? It is the practice, you are aware, that in taxing costs, the Master disallows the declaration filed, where it has been taken out of the office; thus implying, that the attorney must procure the amount from the clerk of the declarations. R.

PROPOSED ALTERATIONS IN CHANCERY COSTS.

(*Continued from p.* 169.)

Trinity Term.	Present Charge. £ s. d.		Proposed Charge. £ s. d.
Paid for office copy answer of ——, fo. 10	0 8 4	These have been before observed on.	0 8 4
Close copy	0 3 4		0 3 4
Paid filing replication	0 7 8	There is no objection to this, under the present practice	0 7 8
Instructions to counsel to move for subpœnas to rejoin	0 2 6	This being an order of course, is unnecessary; both subpœnas to rejoin, and commission to examine witnesses, should issue on the application of the solicitor.	
Fee to him	0 10 6		
Attending him and Court	0 6 8		
Paid for order, entry, copy, and service	0 5 6		
Paid for 4 subpœnas	0 12 0	One subpœna would be sufficient, if copies were allowed to be served.	0 3 0
Drawing precipe for same, attending to bespeak, &c.	0 6 8	There is no objection to this	0 6 8
Service thereof on four Clerks in Court	0 10 0	This should be reduced to 1*s.* 6*d.* for each service, there being no more trouble in serving a subpœna than a warrant	0 6 0
Instructions for interrogatories	0 13 4	This may be allowed as between party and party; but it would be much better to have the actual attendances in getting up the evidence, as between solicitor and client	0 13 4
Drawing same, fo. 50	2 10 0	"Drawing statement for counsel to draw interrogatories," should be substituted for this:—it would generally be about the same length, say 5 sheets, and fair copy	2 10 0
Fee to counsel to settle, and clerk	2 4 6	There is no objection to these, except the clerk's fee	2 2 0
Attending him	0 6 8		0 6 8
Close copy	0 16 8	This should be allowed, as it is always made, and frequently a second copy	0 16 8
Instructions to counsel to move for a commission to examine witnesses	0 2 6	This order is unnecessary and useless: the commission should issue on the application and responsibility of the solicitor.	
Fee to counsel	0 10 6		
Attending him and court	0 6 8		
Paid for order and entry	0 3 6		
Four copies and service	0 8 0		
Attending with, and to strike commissioners' names	0 0 0	This should be allowed, it occasioning considerable trouble	0 6 8
Paid for commission	1 1 9	This should be reduced, and the solicitor allowed to issue it	1 1 9
Attending appointing the commissioners to attend to execute commission	0 6 8		0 6 8
Drawing summons for witnesses to attend the commissioners, and two fair copies	0 6 8	There is no objection to these under the present practice; but it is much to be desired that the proposed alterations in the manner of examining witnesses should be carried speedily into effect.	0 6 8
Service of summons on witness	0 5 0		0 5 0
Ingrossing interrogatories, fo. 50	1 5 0		1 5 0
Paid for parchment	0 5 0		0 5 0
Attending execution of commission	1 1 0		1 1 0
Paid commissioners	2 2 0		2 2 0
Their clerks	1 1 0		1 1 0
Parchment for depositions	0 5 0		0 5 0
Paid witness	0 10 0		0 10 0

	Present Charge. £ s. d.		Proposed Charge. £ s. d.
Paid bill at the inn	2 5 0	The commissioners should be allowed travelling expenses at 1*s.* per mile, but nothing further. (In this case, they resided in the town where the commission was executed)	
Paid messenger with depositions to town	0 5 0	This should be allowed at 10*s.* 6*d.*; for it is well known that no guard of a coach will take the trouble without; it is frequently a loss to the solicitor	0 10 6
Attending to get him sworn	0 0 0	This should be allowed, there being frequently considerable difficulty in getting messengers sworn; and it is by no means a rare occurrence for a messenger to be compelled to take the depositions back	0 6 8
Paid oath	0 1 0	There is no objection to this	0 1 0
Paid entering rules to produce and pass publication	0 15 4	A notice from the plaintiff's solicitor to the defendant's solicitor would answer every purpose: it should therefore be— "Drawing notice to defendant's solicitor to produce witnesses, and that publication would pass on ———, copy and service	0 4 0
Attending Clerk in Court thereon	0 6 8	This would then be unnecessary.	
Term fee, &c.	1 1 8	Observed on before	0 15 0
Michaelmas Term.			
Paid setting down cause, and for registrar's note	1 5 8	This is too much, and ought to be reduced	1 5 8
Paid for office copy depositions, fo. 20	0 16 8	This is too much: 4*d.* per fo. would be adequate	0 6 8
Close copy	0 6 8	This should be allowed in all cases	0 6 8
Paid for four subpœnas to hear judgment	0 12 0	One subpœna would be sufficient, if copies were served, as before observed	0 3 0
Attending for same	0 6 8	There is no objection to this	0 6 8
Service thereof on clerks in court	0 10 0	This should be reduced to 1*s.* 6*d.* for each service	0 6 0
Drawing and ingrossing affidavit of service	0 0 0	There is no objection to these, and they should be allowed, whether the defendants appear on the hearing or not, as it is impossible to foresee whether the affidavit will be necessary.	0 4 4
Paid filing, and for office copy	0 0 0		0 3 8
Abreviating depositions, fo. 20	0 6 8	The objections to the allowance of abbreviating the bill and answers, as before mentioned, are also applicable to the depositions, and should not therefore be allowed.	
Fair copy to add to brief, 2 sheets	0 6 8	There appears no objection to these	0 6 8
Another fair copy brief, 14 sheets	2 6 8		2 6 8
Drawing observations, 2 sheets	0 13 4		0 13 4
Two fair copies	0 13 4		0 13 4
Fee to Mr. H. with brief, and clerk	3 5 6		3 3 0
Attending him	0 6 8		0 6 8
Fee to Mr. B, with brief, and clerk	2 4 6		2 2 0
Attending him	0 6 8	There is no objection to these, except the clerks' fees	0 6 8
Fair copy title and prayer of bill	0 3 4		0 3 4
Attending court, cause in the paper	0 13 4		0 13 4
The like, cause heard	0 13 4		0 13 4
Paid Court fees	0 13 0		0 13 0
Paid for copy minutes	0 7 6	These ought to be reduced	0 7 6

	Present Charge. £	s.	d.		Proposed Charge. £	s.	d.
Close copy	0	4	0		0	4	0
Attending settling	0	6	8	There is no objection to these	0	6	8
Paid for decree	3	6	0	This should be reduced: the unnecessary length and expense of decrees have long been grounds of complaint. It might be reduced at least one half—say	1	13	0
Attending settling and passing	0	6	8	There is no objection to this	0	6	8
Paid entering	0	16	6	This would necessarily be reduced if decrees were shorter—say	0	8	6
Attending to enter, and for same	0	6	8	There is no objection to this	0	6	8
Copy title and ordering part of decree for the Master	0	2	6	There is no objection to these	0	2	6
Warrant to consider decree, three copies and services	0	6	6		0	6	6
Attending same	0	6	8		0	6	8
Paid for advertisement for creditors	0	10	6	If the solicitor were allowed to draw this, a fee of 5*s.* would be a sufficient remuneration, and the attendance would be saved	0	5	0
Attendances, leaving instructions, and for advertisement	0	6	8				
Paid inserting in Gazette	1	5	0	There appears no objection to these	1	5	0
Attending to get same inserted	0	6	8		0	6	8
Paid for Gazette	0	2	9		0	2	9
Fair copy advertisements for newspapers	0	3	0		0	3	0
Paid inserting in Times	0	18	0		0	18	0
The like in Courier	0	18	0		0	18	0
Attendances thereon	0	6	8		0	6	8
Term fee, &c.	1	1	8	See previous observation on this	0	15	0
Michaelmas Term.							
Paid for peremptory advertisements	0	10	6	See observation on previous advertisement	0	5	0
Attendances leaving instructions for same	0	6	8				
Paid inserting in Gazette	1	5	0	There appears no objection to these	1	5	0
Attending to get same inserted	0	6	8		0	6	8
Paid for Gazette	0	2	9		0	2	9
Fair copy advertisements for papers	0	3	0		0	3	0
Paid inserting in Times	0	18	0		0	18	0
The like in Courier	0	18	0		0	18	0
Attendances thereon	0	6	8		0	6	8
Paid for copy charge of ——, fo. 10	0	5	0	This charge is too much: 4*d.* per fo. would be an abundant remuneration; but until the Masters cease to be paid by fees, it is in vain to hope for a remedy	0	3	4
Close copy	0	3	4	No objection to this in country causes	0	3	4
Paid for copy affidavit in support thereof fo. 10	0	5	0	See observations on the two preceding items	0	3	4
Close copy	0	3	4		0	3	4
Attending warrant on charge, when allowed	0	6	8	There is no objection to this	0	6	8
Paid for copy interrogatories, fo. 15	0	7	6	This should be reduced, as stated before	0	5	0
Close copy	0	5	0	There is no objection to this	0	5	0
Term fee, &c.	0	11	8	*Antè*	0	15	0
Hilary Term.							
Attending warrant to settle interrogatories	0	6	8	There appears no objection to these, except that the first warrant to bring in examinations should be peremptory	0	6	8
Warrant to bring in examination, copy and service	0	3	6		0	3	6
Attending same, when defendant's solicitor did not attend	0	6	8		0	6	8
Peremptory warrant to bring in examination	0	3	6		0	3	6
The like, when time given	0	6	8		0	6	8

	Present Charge. £ s. d.		Proposed Charge. £ s. d.
Paid for Master's certificate for a commission	1 7 6	This is too much, and ought to be reduced; 7*s.* 6*d.* would be a fair remuneration	0 7 6
Paid filing same	0 4 10	This should also be reduced, at least one half—say	0 2 6
Attending to bespeak certificate, and afterwards to file same	0 6 8	There is no objection to this	0 6 8
Instructions to counsel to move for commission	0 2 6	This, being an order of course, is unnecessary. The commission should issue on an application by the solicitor, and on his producing the office copy of the certificate.	
Fee to counsel	0 10 6		
Attending him and court	0 6 8		
Paid for order and entry, three copies and service	0 9 6		
Attending with commissioners' names to bespeak, and for commission	0 6 8	There is no objection to this	0 6 8
Paid for commission	1 1 9	This should be reduced—say	0 10 0
Instructions for examination of plaintiffs	0 13 4	There appears to be no objection to these, excepting that "drawing examination" should be	0 13 4
Drawing same, fo. 20	1 0 0	Drawing statement for counsel to draw examination	1 0 0
Fee to Mr. —— to settle	1 3 6	And the fee should be, to draw	1 3 6
Attending him	0 6 8		0 6 8
Ingrossing examination	0 10 0		0 10 0
Paid for parchment	0 5 0		0 5 0
Attending the defendants, reading over and correcting the engrossment	0 6 8	There is no objection to these	0 6 8
Paid commissioners, attending to take same	1 6 8		1 6 8
Solicitor's attendance thereon	0 13 4		0 13 4
Paid Messrs. ——	0 5 0	This should be increased, as before stated	0 10 6
Attending to get him sworn, and paid	0 7 8	There is no objection to this	0 7 8
Term fee, &c.	1 1 8	*Antè*	0 15 0

[*To be continued.*]

HINTS TO ARTICLED CLERKS.

To the Editor of the Legal Observer.

Sir,

In a recent number (p. 151, *antè*) appear some remarks on the subject of reading books, occasioned by a communication from a young gentleman who is anxious to devote some portion of the office hours to that purpose, has claimed it, as a right, of his principal, and complains that it has not been readily conceded. If your correspondent will favor this letter with his attention, he may, perhaps, be assisted in the accomplishment of his wish.

Whoever hopes to make himself thoroughly acquainted with the duties of his profession, and to obtain the requisite knowledge to conduct his business with honor and success, must not delude himself with the notion that practice only will suffice. He must know on what principles that practice is founded; and this he can only do by reading and research. The knowledge that in particular cases, particular modes of proceeding are adopted, and have been sanctioned for a long period, will serve so long as those cases only call for the intervention of the professional man; but no sooner do circumstances vary, and new combinations slightly, or not at all analogous, present themselves, than the mere practical lawyer is as much at a loss as his client. Theory is quite as essential as practice, and both must concur to form the really efficient professional adviser. Much more might be adduced to show the indisputable truth of this assertion, but every considerate man must, on an appeal to experience, find it proved by abundant evidence.

Reading and reflection being therefore necessary, the question is, what time should be set apart for these objects. It can hardly be said that the clerk should neglect the business of the employer, whom he has deliberately covenanted faithfully to serve, in order to adhere to a plan he has inconsiderately formed. A known duty must not be broken to gain a supposed greater advantage. But let the student believe me when I aver that he has only

to resolve to employ usefully *all* the time during which he is at office, and some small portion of his pleasure hours, and he will discover, if he well select his books, that his progress will equal all reasonable hope. In the busiest offices, articled clerks have many leisure quarter, half, and whole hours,—why should they be lost? Scandalous reports, frivolous conversations, lounging over newspapers, sauntering about the streets, are not fitting employments for youths who desire honorable mention, and aspire after eminence. Much—far more than may be generally thought—depends upon the clerk himself; and upon his conduct and application during the term of his articleship, rest, to a very great extent, his future character and estimation. Moderate abilities, accompanied by unremitting perseverance and inflexible integrity, will ensure success and respect. The embryo lawyer must ever remember, that he who diligently and conscientiously performs his duties as a clerk, affords a strong guarantee that he may hereafter be trusted as a principal; and that moral are at least to be as much desired as intellectual qualifications. A strict discharge of the obligations our station imposes, will of necessity induce an adequate cultivation of mind; because without such cultivation obligations must be imperfectly performed. Those are the truly eminent—

"Who know what's right—not only so,
But always practise what they know."

A FRIEND TO THE RESPECTABILITY OF THE PROFESSION.

P. S.—I would remark, though I hope it is needless, that I intend nothing in this letter to be personal.

July 12th, 1832.

UNIFORMITY OF PROCESS ACT.

No. IV.

THE eighth section provides a new form of detaining prisoners who are in the custody of the marshal or warden. This form is to be used in all the courts, and will remove the necessity of having recourse to the various modes of proceeding against prisoners in actions in the different courts, where they are in the custody of the marshal or the warden.

By section 9, a new form of summons is introduced for proceeding against members of parliament under the bankrupt laws, in lieu of that provided by sect. 10 of 6 G. 4. c. 16.

The provisions of sect. 10 are these:—

"That no writ issued by authority of this act shall be in force more than four calendar months from the day of the date thereof, including the day of such date, but every writ of summons and *capias* may be continued by *alias* and *pluries*, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith: Provided always, that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, or proceedings to or toward outlawry shall be had thereupon, or unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned *non est inventus* and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, and unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first writ; and return to be made in bailable process by the sheriff or other officer to whom the writ shall be directed, or his successor in office, and in process not bailable, by the plaintiff or his attorney suing out the same, as the case may be."

From the provisions of this section for preventing the operation of the Statute of Limitations, it would appear that writs must be continued by the actual issue of other writs, and all those writs properly entered of record, except where a defendant is arrested or served, or proceedings to or towards outlawry are taken against him. The former method of proceeding, in order to prevent the statute running, was to issue such a writ as the plaintiff would issue if he were at that time intending to go on with the action; get it returned *non est inventus*, and when in consequence of the defendant's plea of the statute he was forced to reply the writ, he entered the writ upon the roll, and continuances from it down to the term of which the writ was upon which the defendant was arrested or served.

The eleventh section is in these terms:—

"'And whereas, according to the present practice, in certain cases no proceedings can be effectually had on any writ returnable within four days of the end of any term, until the beginning of the ensuing term, whereby an unnecessary delay is sometimes created;' for remedy thereof be it enacted, That if any writ of summons, *capias*, or detainer issued by authority of this act shall be served or executed on any day, whether in term or vacation, all necessary proceedings to judgment and execution may, except as hereinafter provided, be had thereon, without delay, at the expiration of eight days from the service or execution thereof, on whatever day the last of such eight days may happen to fall, whether in term or vacation: Provided always, that if the last of

such eight days shall in any case happen to fall on a Sunday, Christmas Day, or any day appointed for a public fast or thanksgiving, in either of such cases the following day shall be considered as the last of such eight days; and if the last of such eight days shall happen to fall on any day between the Thursday before and the Wednesday after Easter Day, then in every such case the Wednesday after Easter Day shall be considered as the last of such eight days: Provided also, that if such writ shall be served or executed on any day between the tenth day of August and the twenty-fourth day of October in any year, special bail may be put in by the defendant in bailable process, or appearance entered, either by the defendant or the plaintiff, on process not bailable, at the expiration of such eight days: Provided also, that no declaration, or pleading after declaration, shall be filed or delivered between the said tenth day of August and twenty-fourth day of October."

As no declaration, even *de bene esse*, can be filed until the writ has been returned, and as by Rule 8 of T. T. 1 W. 4, no declaration *de bene esse* can be delivered or filed until six days after the service or arrest when the process was returnable on any of the four last days of a term, if the plaintiff declared the defendant would be entitled to an imparlance, as his declaration must be delivered or filed in vacation. In country causes, however, by Rule 3 of H. T. 2 W. 4, the plaintiff was entitled to deliver or file his declaration during four days after *Hilary* and *Trinity* terms, and the defendant must plead as of the preceding term. In some instances, therefore, in country causes, when the process was returnable on the two earlier days of the last four days of term, the plaintiff might proceed in his action. In all town causes, however, he was precluded from so doing. Now he may take effectual proceedings at whatever time the process is returnable, subject, however, to the provisoes contained in this section.

As the present act only relates to the commencement of actions, and not judgments obtained in them, the plaintiff will still have power to apply for, and, if the judge at *nisi prius* shall think it right, to obtain speedy judgment and execution under the 1 W. 4. c. 7. § 2. (See 2 Dowling's Stat. 15.) The cases in which that statute applies are, "in all actions brought in either of the said courts, by whatever form of process the same may be commenced." It will be necessary to keep in view sect. 6 of the last cited act, in cases where speedy judgment and execution are obtained. By that section "no officer of either of the said courts shall, for the purpose of taxing costs on any judgment to be signed by virtue of this act, be compelled to attend at any time between the last day of August and the twenty-first day of October in any year." The limitation of the time for effectual proceedings on writs issued under this act, and for taxing costs, do not therefore correspond.

The twelfth section contains nothing new, as to the *teste* of writs. It requires particularly the indorsement of the name and place of abode of the attorney *actually* issuing the writ; and in case he is not an attorney of the court, the name and place of abode also of the attorney in whose name it is issued. In case no attorney be employed, the plaintiff must state the parish, hamlet, street, and number of the house in which he resides.

The thirteenth section points out the proper persons on whom to serve writs of summons on corporations, and on inhabitants of hundreds and towns.

The fourteenth authorizes the judges to make general rules for the execution of the act.

The fifteenth section enables the court, in term, or a judge, in vacation, to order the return of any writ issued by authority of this act, or of any *ca. sa.*, *fi. fa.*, or *elegit*. Before this provision, the returning officer must always have been compelled by sidebar rule, and not by order, to return the writ.

The sixteenth section authorizes plaintiffs to take all proceedings stated in any writ, notice, or warning, as to be taken in default of the defendant's appearance, or putting in special bail, as the case may be.

By section 17. it is provided,

"That every attorney whose name shall be indorsed on any writ issued by authority of this act, shall, on demand in writing made by or on behalf of any defendant, declare forthwith whether such writ has been issued by him, or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the court or any judge of the same or of any other court shall so order and direct, declare in writing, within a time to be allowed by such court or judge, the profession, occupation or quality, and place of abode of the plaintiff, on pain of being guilty of a contempt of the court from which such writ shall appear to have been issued; and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, the said court, or any judge of either of the said courts, shall and may, if it shall appear reasonable so to do, make an order for the immediate discharge of any defendant or defendants who may have been arrested on any

such writ, on entering a common appearance."

These powers, it is conceived, the courts possessed before, and would have been exercised by them, where a proper case for their interference was made out.

UNIFORMITY AS TO THE SIGNATURE AND ATTESTATION OF WILLS RECOMMENDED.

THERE is a strange want of uniformity in the law, with regard to the signature and attestation of written wills. A man may bequeath his chattels real (however valuable), and any amount of personal property (except money in the funds), by mere writing *in his own hand, though neither signed nor sealed, nor*, if signed, *attested*. Money in the funds must be "*devised*" by will in writing "*attested by* TWO *or more credible witnesses.*" Wills of freeholds of inheritance, or mere freehold, must be attested by "THREE *or more credible witnesses.*" With regard to copyholds, or customary lands, prior to the 55 G. 3. c. 192, they passed by surrender to the uses of the will, the surrender being considered the efficient instrument, and the will as a declaration of the uses of the surrender. That statute having taken away the necessity of a surrender, it follows, that at the present day, copyholds (which are not within the statute of frauds, or the statute of wills) are devisable by a mere testamentary paper, though unattested and unsigned. It has even been doubted, whether such testamentary disposition might not be by word of mouth.

Of course these observations are not intended as information, but merely to call attention to the subject, and to suggest the propriety of some uniformity being introduced, with regard to the signing and attestation of wills. And this uniformity, it is strongly recommended, should be applied to wills and testaments *eo nomine*, without regard to the *nature*, which is no criterion as to the *value* of the property devised or bequeathed. Every man *knows* when he is making his *will*, and if it were the law that *every will* should be "executed by the testator, or by some person in his presence, and by his direction, and attested by three or more credible witnesses," it would not be carrying the saying, "*ignorantia legis, &c.*" too far, to require that every man should know that such were the law; but surely the present law, which would regulate the solemnities to be observed in the execution of a will, by the *nature* of the property it affects, is highly unreasonable, inasmuch as it assumes that every testator is aware of the legal distinctions between real and personal estate. Is there one unprofessional man in a hundred, who is privy to the mystic operation of the rule in equity, that "money contracted to be invested in the purchase of land, and land agreed to be turned into money, are to be considered as immediately assuming the qualities of that species of property into which it is the object of the contract to convert them?" Is it generally known, beyond the pale of the profession, that for a man to devise his house, which he holds *pur auter vie*, he must have three witnesses, though he may bequeath his 999 years leasehold farm without any witnesses? That a rent issuing out of leasehold estate is personalty, and may be disposed of by will without witness, though if it arose from freehold, it could not be devised without three witnesses? I do not contend that all technical learning as to the construction of a will ought to be abolished, but I do submit that it should be dispensed with as much as possible, considering the frailty of human nature, and consequently the frequent necessity for uninitiated persons preparing that important document. Personal estate is now, in point of value, upon an equality with real property, and ought therefore to be equally recognized and protected by the law of wills Then let the utility of the statute of frauds, "the wisest law in our statute book," and "every line of which is worth a subsidy," be increased, by requiring every will and testament (excepting nuncupative dispositions), to be executed and attested precisely as the law now requires in order to render valid devises of real estate. Such a provision, it is obvious, would render the law uniform and certain, and at once put an end to all litigation as to the due execution of wills, in those cases where the nature of the property disposed of is uncertain.

T. P.

SUPERIOR COURTS.

KING'S BENCH.—PRACTICE COURT.

INTERPLEADER ACT.—SHERIFF.—ADVERSE CLAIMANT.

Where an adverse claim is set up to goods seized by the sheriff, and the latter applies to the Court for relief, under the 1 & 2 W. 4. c. 58, § 6, and the adverse claimant does not appear to support his claim, the Court will bar his claim as to the sheriff, and make him pay the judgment creditor his costs of appearing on the sheriff's rule; but will not allow the sheriff his costs.

On shewing cause against a rule obtained by the sheriff under the Interpleader Act, the 1 & 2 W. 4, c. 58, § 6 [a], on the ground, that since he had seized under a *fieri facias*, issued against the defendant's goods, he had received notice of an adverse claim to the goods so seized; the adverse claimant did not appear; but the sheriff and the judgment creditor appeared; the former to support his rule, the latter to resist the adverse claim.

Taunton, J. having taken time to consider

[a] 2 Dowl. Stat. 571.

what course ought to be adopted, he now delivered his judgment. "The party making the claim here did not appear to support his claim; and the question now is, what is proper to be done. I have conferred with the other judges on the subject, and they think, that the rule obtained by the sheriff should be made absolute, there being no cause shewn against it. The adverse claimant, therefore, is barred, as against the sheriff (§ 3). Then, as to the question of costs The judgment creditor says, it is very hard that he should be put to the expense of appearing on this rule, merely upon the false claim of a third person. The Court having looked at the act of parliament, by which (§ 3) the costs are placed in its discretion, are unanimously of opinion, that the rule should be made absolute, with the costs of the judgment creditor to be paid by the party making the claim. It is a rule which was very early laid down, not to allow the sheriff in any case his costs of coming to the Court, because it was thought, that the act was sufficiently beneficial to sheriffs without granting them their costs.

Rule absolute. *Bowdler* v. *Smith*, E. T. May 12th, 1832. K. B. P. C.

Meeson, for the sheriff.

Burstow, for the judgment creditor.

TAXATION OF COSTS.—MASTER'S DISCRETION.—LIBEL.

The Master, in general, is sole judge of what witnesses shall be allowed on taxation; and therefore, when he had, in an action for libel, disallowed all witnesses to prove inuendoes, the Court refused to interfere to make him revise his taxation.

Mansel moved for a rule to shew cause why the Master should not review his taxation. The action was for a libel. Two classes of witnesses were subpœnaed by the plaintiff; the first to prove inuendoes, and the second to prove special damage. The master has disallowed the costs of all the witnesses who were to prove the inuendoes. Now it is not the province of the master to say, that no witnesses are to be called to prove an inuendo in a libel, although he may disallow any of them if he thinks proper.

Taunton, J.—I am of opinion, that no rule ought to be granted; and I wish it was better known to attorneys, that the mode of taxing costs resides with the Master, and not with the Judges of the Court. The Master is the proper officer of the Court to perform this duty; and in the performance of it he must use his own discretion; for it is utterly impossible to lay down any rules with such precision as to meet the circumstances of every case. The Master is to allow or disallow the costs of particular witnesses; and I think no part of his duty requires the exercise of so much discretion as the number of witnesses brought to trials at assizes. I think the discretion of the Master ought not to be brought into review as a matter of course.

Rule refused.—*Shelton* v. *Seward*, E. T. May 11th, 1832. K. B. P. C.

LONDON COURT OF REQUESTS ACT.—COSTS.—SUGGESTION.

Partners keeping a counting-house only, for the purpose of receiving orders in the city of London, and carrying on business at Liverpool also, are not within the provisions of the London Court of Requests Act, the 39 *and* 40 *Geo.* 3, *c.* 104, § 12.

Lloyd shewed cause against a rule obtained by *Wightman*, for entering a suggestion on the roll to deprive the plaintiff of costs under the London Court of Requests Act, the 39 & 40 G. 3. c. 104. § 12, on the ground that the plaintiff had recovered less than 5*l.* in an action brought in this Court. The sum for which judgment was signed, was 3*l.* 7*s.* 6*d.* The only question in this case is, whether the defendants are persons within § 5 of the act. The affidavits shew, that the defendants are partners, as wine merchants; that one carries on business in Mincing Lane, in the city of London, and the other at Liverpool; that the defendant Strowd has a counting house in Mincing Lane, where the invoices are generally made out, dated London; but wines are also kept at Liverpool, at which place the defendant Wilkinson lives. The words of the fifth section are, "any person or persons whomsoever, residing or inhabiting within the city of London, or the liberties thereof, or keeping any house, warehouse, shop, shed, stall, or stand, or seeking a livelihood, or trading or dealing within the same city or liberties."[a] The defendants here keep a counting-house only in the city of London. But the word "counting-house," is not in the act, and the omission may well be supposed to have been designed, inasmuch as all the other words used, import the possession of some effects in the city, which might be made available to satisfy debts. "Keeping a counting-house," therefore, does not bring the defendants within the act, and they must rest on the words "seeking a livelihood." Now in *Kemsett* v. *West*,[b] it was holden, on the authority of *Stephens* v. *Derry*,[c] that this would not bring the defendant within the protection of the act, unless London was the *only* place in which "he sought his livelihood." Now it is clear, from the facts stated in this case, that London is not "the *only* place in which" the defendants seek their "livelihood." They are therefore not within the act; and therefore the present rule must be discharged.

Wightman, in support of the rule, contended, that this case was distinguishable from *Kemsett* v. *West*, of which indeed it was the converse; and that under the circumstances,

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[a] 1 Chit. Stat. 224.

[b] 5 D. & R. 626.

[c] 13 East, 161.

the defendants must be held to be within the statute.

Taunton, J.—The defendants must either bring themselves within the letter of the statute, or shew that they obtain their entire livelihood within the city. They have only a counting-house in the city; and in *Kemsett* v. *West*, that was holden not to be within the act. Then, they do not obtain their entire livelihood in the city of London; for they carry on business principally at Liverpool, where the wines are, and only keep a counting house, for orders, in London. They therefore carry on business at both places. In *Kemsett* v *West*, it was holden, that unless the city of London is the *only* place in which "a defendant seeks his livelihood," he is not within the statute. The present rule, therefore, must be discharged.

Rule discharged.—*Reeves* v. *Stroud and Wilkinson*. May 9th, 1832. K. B. P. C.

ARREST WITHOUT PROBABLE CAUSE. — 43 GEO. 3. c. 46. s. 3.

If a defendant be arrested on process from the Palace Court, and the cause is removed into the Court of King's Bench, and the plaintiff does not recover to the amount sworn to in the affidavit of debt, the defendant is not entitled to his costs, under the 43 *Geo.* 3. *c.* 46. § 3.

Wallinger shewed cause against a rule for taxing the defendant his costs, pursuant to the 43 Geo. 3. c. 46. § 3, on the ground that the plaintiff had not recovered the amount sworn to in the affidavit of debt, and for which the defendant had been arrested. The action had been commenced in the Palace Court, and removed into this court. The words of the statute are, that "in all actions to be brought in *England* or *Ireland*, wherein the plaintiff or defendant shall be arrested and held to special bail, and wherein the plaintiff or plaintiffs shall not recover the amount of the sum for which the defendant, or defendants in such actions shall have been so arrested and held to special bail, such defendant or defendants shall be entitled to costs of suit, to be taxed according to the custom of the court in which such action shall have been brought; provided that it shall be made appear to the satisfaction of the court in which such action is brought, upon motion to be made in court for that purpose, and upon hearing the parties by affidavit, that the plaintiff or plaintiffs in such action had not any reasonable or probable cause for causing the defendant or defendants to be arrested and held to special bail in such amount." The court here is not "the court in which such action has been brought," and therefore it has no power to grant the defendant his costs. In the case of *Costello* v *Corbett*[a], the action had been commenced in the Palace Court, and was removed by the defendant into the Court of Common Pleas. The plaintiff having recovered considerably less than the sum for which he had arrested the defendant and holden him to special bail, a rule *nisi* was granted to tax the latter his costs, under the 43 Geo. 3. c. 46. § 3. The Court then thought that they had no authority to interfere. In *Handley* v. *Levy*[b] the Court of King's Bench was of the same opinion.

Archbold, contrà —This is an action within the equity of the statute. When a cause is removed by *habeas corpus* into this Court from an inferior jurisdiction, a party is obliged, in fact, to begin a new action. There is a new declaration, and new proceedings altogether. The plaintiff may declare for another cause of action if he thinks proper. He must declare here. The cause is therefore begun here, as the declaration is, in fact, under such circumstances, the commencement of the action. The action is, in fact, brought here.

Taunton, J.—The Courts of King's Bench and Common Pleas having intimated an opinion on this statute, that the word "brought" is the same as "originally commenced," I am bound by their decision. If the case were to be considered now for the first time, I will not say what my opinion might be. The rule must, therefore, be discharged.

Rule discharged. ——— v. *Dawson*, E. T. April 26th, 1832.

NISI PRIUS.

LIBEL.—EVIDENCE.

On an indictment for libel, where the words of a placard alluded to former warnings to the prosecutor, who said he could not understand the placard without referring to certain anonymous letters received by him, those anonymous letters, together with a paper in the handwriting of the defendant's clerk, and certain advertisements, alluded to in the placard, were admitted as evidence, without proof of the clerk's authority from defendant to write the paper.

Criminal information for a libel published by the defendant previous to an election of a member of parliament for Oxfordshire. It was proved, that 7,000 copies of a placard had been printed by the defendant's order. This placard alluded to previous communications made to Mr. Fane, in these words: "Were you not warned your own character was at stake? Were you not informed, &c.?" Four anonymous letters had been sent to Mr. Fane, who said that he understood the expressions used in the placard to allude to these anonymous letters, and had it not been for the letters, he should not have understood the placard. A written paper, which had been proved to be in the hand-writing of the defendant's clerk, and some advertisements in the newspapers, alluded to in the placard, together with the above mentioned letters, were offered on part of the Crown.

Denman, *F. Pollock*, and *Follett*, objected

[a] 4 Bing. 474.

[b] 8 B. & C. 637.

to the admission of the letters, advertisements, and the paper in the handwriting of the defendant's clerk, on the grounds that they were not sufficiently referred to in the placard, to render them admissible; and that the written paper could not be read against the defendant, as no authority was shewn from the defendant to his clerk to write it.

Lord *Tenterden*, C. J.—My opinion is confined to the circumstances and evidence in the present case. Mr. Fane distinctly stated, that the placard was not intelligible without a reference to the letters, and that he understood it to allude to those letters. The placard was proved to have been published by the defendant, who in that refers to previous communications; he must therefore submit to have them read. The jury must not infer that they were published by the defendant. The advertisements are also sufficiently alluded to in the placard to render them admissible, and also the paper in the handwriting of the defendant's clerk.—*Rex* v. *Slaney*. Feb. 8th, 1832. N. P. K. B.

NOTES OF THE WEEK.

House of Lords.

FINES AND RECOVERIES.—LIMITATION OF ACTIONS.—INHERITANCE.—CURTESY.

These Bills continue waiting for the second reading; and from the intimation which has been given of the necessity of hastening the public business on account of the prevalence of disease in the Metropolis, we presume the proposed alterations will not be effected during the present Session.

SENTENCE OF DEATH.

We have still to record that this Bill waits for the report of the Committee; which we think is much to be regretted, for the sake both of justice and humanity.

ANATOMY.—REMEDIES AGAINST THE HUNDRED.

These measures continue in suspence; waiting for the third reading. A little sacrifice of time and indulgence would dispose of these questions.

PRESCRIPTION.

The amendment of the Commons has been considered and agreed to.

House of Commons.

PRIVILEGES OF PARLIAMENT.

Mr. Baring's Bill on this subject has been deferred till the 1st of October. The question is an important one, and ought to be well considered.

STATUTE OF FRAUDS AMENDMENT.—ATTESTATION OF INSTRUMENTS.

These Bills are further deferred till Monday next. They are certainly useful in principle, and ought to receive early attention.

DOWER.

This Bill, which (we know not for what reason) has been left behind the other Real Property Bills, still lingers in Committee. Supposing a ground for preference as to abolishing Fines and Recoveries, Limitation of Actions, and Inheritance, we do not see why the Law as to Curtesy should require an earlier alteration than that of Dower; but the former has made its way to the Upper House.

SEWERS.

The further consideration of the report on this Bill has been deferred.

INNS OF COURT.

An Address to his Majesty was moved by Mr. Harvey, "to direct the Commissioners appointed to enquire into the State and Practice of the Law, to examine into the course of proceedings before the Benchers and Visitors of Lincoln's Inn, Inner Temple, Middle Temple, and Gray's Inn, upon the application of persons seeking to become Students thereof, or to be called to the Bar." The votes, for the motion, were 26, and against it, 2; but the numbers not being sufficient to form a House, the motion was not carried. It is understood, however, that the Common Law Commissioners will enquire into the matter.

SITTINGS AT THE ROLLS.

Short Causes—Thursday, July 26th, at eleven o'clock.

SITTINGS OF THE COURT OF REVIEW.

Petitions in Bankruptcy *for hearing* before the Court of Review, presented *after Monday* the 16th of *July*, will be answered for the First Seal before next Michaelmas Term.

All intermediate Petitions will be in the paper on the days for which they are specially appointed; and the whole of the Petitions that remain undisposed of, and are in a state for hearing on *Tuesday* the 24th *July*, will be placed in the paper of that day, and the Judges will continue their present Sittings until such paper is gone through.

MINOR CORRESPONDENCE.

AFFIDAVITS IN BANKRUPTCY.

Sir,

Allow me to call your attention, and that of your readers, to the subject of affidavits in bankruptcy, particularly with regard to those arising in the prosecution of a country fiat. The recent act only authorizes persons to swear affidavits before the Commissioners in Basinghall Street, when the subject matter is immediately within their cognizance and jurisdiction; so that affidavits made by London creditors, *to prove* their debts before a country tribunal, must be sworn at the Public Office. I would suggest, that all affidavits of this nature be sworn either at the Public Office in Southampton Buildings, or before any one of the Commissioners in Basinghall Street, in order that professional men and their clients may be generally and equally accommodated.

Aspiro.

FILING COGNOVITS.

The observations in your valuable Miscellany, relative to the stamping cognovits, is equally applicable to the necessity imposed by the statute for filing them. You are aware, that no limit in amount is assigned as to the latter; and as it frequently happens that those instruments are taken for very small sums, it is extremely desirable that the hardship thus imposed upon defendants should be removed.

J. N.

ANSWERS TO QUERIES.

COMMON LAW.

EXECUTION.—BANKRUPTCY. P. 176, *ante*.

Your correspondent, in stating this query, appears to think, that the defendant having been declared a bankrupt before the expiration of two months from the time of levying, is the great point at issue, and consequently, I presume, omits to mention whether the produce of the levy was received by the sheriff *before or after he had notice of a commission having issued*. Referring, however, to the late cases of *Notley and others, assignees*, v. *Buck*, 8 B. & C. 160, and *Morland and another, assignees*, v. *Pellatt*, *ibid*, 722, he will find that the latter point alone is the gist of the action.

The former case deciding, that the sheriff having levied the goods of an execution creditor upon a judgment by *nil dicit, who afterwards, and before the goods were sold*, committed an act of bankruptcy, of which he had due notice, was not justified in paying over the money, and was liable to be sued for it by the assignees, in an action for money had and received. And the latter case deciding, that a judgment creditor was entitled to retain the amount *received by the sheriff the day before the act of bankruptcy*, although in consequence of his neglect, he had notice of the commission having issued before his paying it over; upon the principle, as stated by *Bayley*, J., that "after seizure, and before the sale, the sheriff has a special property in the goods; but the debtor has the general property: up to that time, therefore, the debt is not extinguished, and the judgment creditor has a security for his debt. But after sale, or on payment of the money, the sheriff becomes the debtor, and the original debt is extinguished."

Mancuniensis.

QUERIES.

COMMON LAW.

SHAM PLEA.

Several practitioners have lately entertained great doubt whether a sham plea of judgment recovered can now be pleaded; but I have been unable to find out from whence such doubt has arisen. Perhaps some of your numerous correspondents can favor me with a decision on the point.

J. K.

LAW OF PROPERTY AND CONVEYANCING.

VESTED LEGACY.—INTEREST.

A. leaves a sum of 10,000*l.* stock to trustees, in trust to support *B.* his son (a lunatic) during his life, or until his recovery; and on his death, in the event of his not recovering, then to all *B.*'s brothers absolutely, in equal shares. The stock has accumulated considerably; for which the will did not provide. Will, therefore, the disposition (by deed, will, &c.), of

any of *B.*'s brothers, in the event of their dying before *B.*, either with or without children, pass the accumulations, as well as their interest in the original stock? or will the accumulations belong to the next of kin of *B.* living at his decease, to the exclusion of a creditor or legatee, &c.? Z.

LAPSED LEGACY.

It seems pretty clearly decided, that where a legatee dies in the lifetime of the testator, the legacy will lapse; but the rule, with regard to persons dying subsequent to the testator, but before their legacy becomes payable, does not appear to be so well settled. Will any of the readers of the Legal Observer take the trouble to refer the writer to the best authorities on the subject, or state what is the general principle of law laid down in decided cases? As, for instance, a testator gives a life estate to his widow, and directs the division of the corpus of the estate among his children at her decease. One of such children, having survived the testator, dies in the life time of the tenant for life. Does the legacy to such child lapse, or not? A. Z.

TENANT BY CURTESY.

A. B. devised a freehold messuage and premises to *C.*, a single woman, in fee. *C.* marries and dies, leaving a child, which died in infancy, her husband and a brother, her heir at law, her surviving. The husband retains possession of the premises as tenant by the curtesy. The brother is lately dead. Will the premises pass under the residuary clause of the mother's will, the same not being specifically named; or will it, on the death of the tenant by the curtesy, descend to the brother's eldest son? X.

LAW OF LANDLORD AND TENANT.

FRAUDULENT REMOVAL.

Is a weekly *under-tenant* (in the *actual occupation* of a *portion of premises* demised by lease) a tenant within the meaning of the stat. 11 Geo. 2. c. 19, so as to be liable to a proceeding under the 4th section, for clandestinely removing his goods from the *part* of the premises which he occupied, to prevent the superior landlord from distraining them for arrears of rent due from the under-tenant's immediate landlord in respect of the *whole* of the premises comprised in the lease? J. B.

MISCELLANEA.

THE CONDEMNED CELLS OF NEWGATE.

The cells consist of a number of chambers placed in three rows, one above the other, in a stone building, which fronts one side of the press-yard, at the north east corner of the prison, adjoining the residence of the ordinary or chaplain, which is the first house on the south side of Newgate Street, going towards Cheapside. The *size* of each cell is eight feet long by six wide, and generally contains three, sometimes four prisoners. The only *furniture* of the cells consists of a rope mat, and a common stable rug, for each prisoner, with an iron candlestick for the use of the party. The walls, floors, and roofs of the cells, are of stone. The only communication of the cells with the outward *air*, is by a hole through the front wall, which is three feet thick, and this hole is all but stopped by two frames of close iron bars crossed. The *time of confinement* is from dusk till day-light during winter, and from dusk till eight o'clock next day in summer. In winter, and in the neighbourhood of St. Paul's, dusk begins at three o'clock in the afternoon, and day-light at nine in the morning; leaving to convicts under sentence of death, six hours of the twenty-four for washing, eating, exercise, intercourse with their friends, the chapel service, which they attend every day, and lastly, exertions to propitiate the King in Council, on whose opinion of their cases depends the question of life or death. At the southern extremity of the cells, are two large rooms for the use of the prisoners during the day. The continuous outer wall of the cells, and of these rooms, being about twenty yards long, forms one side of the press-yard; the other side is a blank stone wall, of the same height, the distance between them being but a few yards; and the two ends of this narrow, gloomy place, are formed by blank stone walls, armed like the others, with spikes, and *chevaux de frize*. The mode of entrance to the cells, is by a narrow, dark staircase, and by similar passages running at the back of each row of cells, into which the strong door of each cell opens. The only entrance to the press-yard, is through narrow and devious passages, defended by several doors of great strength, and during the day, by watchful turnkeys, and finally by a door-way in the southern wall of the press-yard, where a gate of iron bars confines the prisoners, whilst it permits them to communicate with their friends across a short passage, terminated by another gate of bars; a turnkey being placed between these two gates, to see and hear all that passes. The wall which forms the northern extremity of the press-yard abuts upon Newgate Street, and whatever its thickness, that space alone divides the convict under sentence of death from the busy or thoughtless crowd without, whose voices, and even steps, he may sometimes hear.—*Wakefield's Facts relating to the Punishment of Death in the Metropolis.*

The Legal Observer.

VOL. IV. SATURDAY, JULY 28, 1832. No. XCIII.

"——— Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

ON LOCAL COURTS FOR THE RECOVERY OF SMALL DEBTS.

CONSIDERATION OF THE QUESTIONS OF THE COMMON LAW COMMISSIONERS.

It is now time that we advert to the questions on this subject issued by the Common Law Commissioners, contained in our number for the 9th of June, p. 88. The first three questions relate to the trial of causes at the Assizes. The 4th, 5th, 6th, and 7th apply to the existing Local Courts. The 8th is a general question on the result of the whole of the present system. The 9th and 10th concern the improvement of the present Local Courts, or the establishment of others; and the 11th and 12th relate to appeals and issues, or inquisitions.

The first question is one of a very wide and general nature. It enquires whether there is any, and what degree of inconvenience, arising from the *delay* between the commencement of a suit and a trial at the Assizes, or from the *expense*, &c. The delay and the expense being thus taken for granted, there can be no doubt that they are productive of inconvenience; but the real question, of course, is, whether the delay and expense are unavoidable.

Now the chief expense in the trial of a cause, whether in town or at the Assizes, depends on the number of witnesses, their station in life, and the distance from which they come. There are some cases in which, the documentary evidence being extensive, a large part of the expense is applicable to official and other copies supplied to counsel, of such documents. But generally speaking, the heaviest item in a bill of costs at the assizes is the payment on account of witnesses. It is for the Judges to consider, whether, in London and Middlesex, as well as at the Assizes, it be practicable to make some arrangement, by which the day of trial could be more certainly known, and the expense of keeping witnesses several days be avoided.

The course at present pursued is, to appoint for each day a given number of causes, in order to ensure the full occupation of the Court till the intended hour of rising. In a large majority of instances the business of the day is not got through, and all the expense of the attendance must be repeated the next day, and not unfrequently the third. Such is the case as to *Special* Juries. In *Common* Jury causes the uncertainty is still greater, and witnesses from a distance are frequently in waiting a whole week; and even then the trial may not come on, and part of the expense is again incurred at another sittings. We are aware that this practice has arisen from the anxious desire of the Judges to diminish the heavy arrear of the Cause List; and the whole question depends on balancing the advantages and disadvantages of a different plan.

Many of the Judges are already too much burthened with business, and ought to be relieved; but we question whether they *all* bear a sufficient share of judicial labour. As the former difficulty of dissimilarity of practice in the several courts is now at an end, the weight of duties might be equalized. It then remains to consider whether fifteen Judges cannot efficiently dispose of all the cases which come before them for trial. If they cannot do so, the number should be increased; but we have no doubt that by proper arrangements, the whole may be accomplished by the present Judges, sitting

in such rotation as may be deemed expedient. We should then have a large branch of expense very considerably reduced, and all parties saved much inconvenience.

The second question is directed to the degree of inconvenience of holding assizes at *one place* only, for the whole of each county; and the third enquires in what causes, as to *nature* and *amount*, such inconvenience is particularly felt.

It is obvious that in local actions, where most of the witnesses come from one place, if the assizes should be at a distant part of the county, and they are detained any length of time, the expense becomes very considerable; and of course it is most felt in actions of small amount: and this will be the case whatever may be the nature of them, except that in some cases (as trespass) the decision, though of trifling pecuniary importance, may involve a question of title.

In large and populous counties it would be a manifest relief to the suitors, if the assizes were adjourned from one principal town to another — as from Lancaster to Liverpool, and so in different parts of Yorkshire. There will, however, be some inconvenience in breaking up the old channels in which the course of business has hitherto proceeded, and we should recommend the experiment to be tried in one or two of the most important counties before the plan be carried farther.

The 4th, 5th, 6th, and 7th questions relate to the existing Local Courts, whether County Courts or otherwise—the extent of their jurisdiction—the expense of proceedings—their defects, &c.

A principal defect in these Courts, and which is much felt in London, is, that the judgment cannot be enforced out of the local jurisdiction. Another objection is, that the practice of these local courts is confined, in some instances to four, and in others to six attorneys; and, however respectable they may really be, the suitors do not choose to confide in them, because they are unknown. The advantage of removing one of the legal monopolies has been exemplified in throwing open the Exchequer of Pleas; and it is probable that if the attorneys of the Superior Courts were entitled to practise in all the inferior Courts, they would either do so personally, or employ agents or competent clerks to transact business of a kind which might properly belong to such Courts.

To establishing new local Courts, with distinct practitioners, there is also this objection,—that they will necessarily be of an inferior order; whilst the removal of the present business from the attorneys of the superior Courts will so diminish the practice, that persons of respectable station will not continue in it, or bring up their connections to succeed them.

The public are therefore equally interested with the several Courts of Justice, in preserving an honourable and responsible class of persons as practitioners, because the power entrusted to them by the Court is unavoidably of the greatest magnitude. They are not only the hands to receive the fruit of the verdict, but might practise the greatest oppression and injustice in the whole progress of legal proceedings. The instances in which the process of the Court has been abused are exceedingly rare; and it is of the first importance to the due and faithful administration of justice that the high character for intelligence and integrity which the present members of the profession have attained, should be preserved.

The 8th is a very comprehensive question, including the whole of "the present system" of legal procedure, as to its effect "in inducing dishonest men to refuse payment of their just debts by their knowledge of the difficulty of enforcing them." There is "much to be said on both sides" on this point. Though there may be difficulty in enforcing payment, the defendant must recollect that he will be liable to the costs of the proceedings; and in some cases therefore, the dishonest debtor will pay rather than incur them. If the expense were small, he would probably take the benefit of the delay.

The 9th asks, whether the County and other Local Courts should be continued, and with what alteration; or whether a general Local Court for each county should be established.

Now, if a change must take place—if the improvement of the practice of the superior Courts will not be sufficient—it seems clearly preferable to revive and modify the ancient Courts. A very large proportion of debts due from traders, are owing to wholesale houses in London, or in the large manufacturing towns: and it would be manifestly unjust to compel them to resort, with their witnesses, to all the petty courts within the jurisdiction of which the debtor might reside. It is more just and reasonable that, as the debtor chooses to enter into contracts with the manufacturer—deriving the advantage of his skill and capital—he should be obliged, in case of default, to answer the creditor in such Court as may be convenient

to him. We recommend, therefore, that the creditor should have the option of resorting either to the superior or inferior Court, as he may think proper.

Thinking that the public will not be benefited by a General Local Court in each county, we pass by the 10th enquiry, as to the jurisdiction, practice, &c. of such Courts; and proceed to the 11th question. We think the opinion of the profession, as well as the *public*, must generally be, that an appeal should be allowed from the inferior Court, whether on the present or any other system. Every subject of the realm has a right to the judgment of such of the superior Courts as the question belongs to. He ought not to be limited to the opinion of an inferior functionary—especially as in these petty Courts many important and difficult questions will arise which can scarcely be well understood in a tribunal not devoted to any particular class of cases, but adjudicating upon almost every variety of human transaction—limited only by the amount of the sum in question. The greatest inconvenience would arise from the *uncertainty* of local decisions, unless they were subjected to revision by the higher Courts.

It would seem, from the terms of this question, as if it were intended that juries should not form part of the tribunal; for it is asked, whether an appeal "should be allowed on law or *fact*." The latter of course could only be made to a Jury Court, and it would therefore be still more objectionable on public grounds, if such an appeal were not allowed. There would probably be no objection to the condition, as suggested, of requiring security for the costs on the plaintiff's appeal, and for debt and costs on that of the defendant.

The last question contains a hint, which we think might be properly adopted, namely, that in actions in the superior Courts, of a certain amount, issues might be tried before the Sheriff or an Assessor, at such convenient place in the several counties as might diminish the expense of conveying witnesses. This measure would go far towards removing the evil at present complained of in regard to the costs of a trial at *nisi prius*. Indeed, with such improvements as here suggested, the necessity of establishing any new Courts will be altogether superseded.

We have thrown out these remarks for the consideration of our readers, and we trust they will in some degree assist those who intend to transmit their answers to the Common Law Commissioners.

PRACTICAL POINTS OF GENERAL INTEREST.

No. XXVII.

WHEN A BILL MAY BE PRESENTED.

The following case deserves attention.

This was an action by the plaintiffs, as indorsees, against the defendant, as the drawer of a bill of exchange for 350*l.*, accepted by one Townsend, payable at No. 15, Godliman Street, Doctors' Commons. The only point was on the presentation, which had been as follows: Between 7 and 8 o'clock of the evening of the day when it became due, a notary's clerk went with it to No. 15, Godliman Street. The door of the house being shut, he rang the bell and knocked, but no answer was given.

Lord *Tenterden*, before whom the action was tried, was of opinion, that the presentment was sufficient, and a verdict was found for the plaintiff.

Campbell now moved for a new trial. It may be conceded, that if the house had been open, the presentment would have been sufficient. A presentment, out of the hours of business, to a banker, in a place where, by the known custom of that place, all persons of his description leave off business at stated hours, is insufficient; but to an acceptor not so circumstanced, as an an ordinary trader, it has been held, that 8 o'clock in the evening was not an unreasonable hour for presentment; *Barclay* v. *Bailey*, 2 Campb. 527; *Morgan* v. *Davison*, 1 Starkie, 114. In both those cases, however, the house was open, and there was a servant of the acceptor at the place where the bill was made payable. Here the holder, by omitting to present till so late an hour, took on himself the risk of finding the house shut up, and no person to pay the bill. A presentment at 12 o'clock at night clearly would not be sufficient.

Lord *Tenterden*, C. J.—As to bankers, it is established with reference to a well known rule of trade, that a presentment out of the hours of business is not sufficient; but in other cases the rule of law is, that the bill must be presented at a reasonable hour. A presentment at 12 o'clock at night, when a person was retired to rest, would be unreasonable; but I cannot say, that a presentment between 7 and 8 in the evening is not a presentment at a reasonable time.

Littledale, J. concurred.

Parke, J.—A bill or note must be presented for payment at a banker's in the usual hours of business; but in all other cases it must be presented at a reasonable time. I think 8 in the evening was, in this case, a reasonable hour.

Patteson, J.—The question to be considered is, whether the bill was presented at the place appointed, at a reasonable time, not whether any person was there to receive it. I think the bill, in this case, was presented at a rea-

sonable hour. *Wilkins* v. *Sadis*, 2 B. & Ad. 188.

The other cases on this point are, *Parker* v. *Gordon*, 7 East, 385; S. C. 3 Smith, 358; 6 Esp. 41; which is the leading case in favor of the necessity for a presentment to a banker within business hours; but a presentment out of business hours will be good, if there is any one at the place who refuses payment; *Henry* v. *Lee*, 2 Chit. Rep. 124; *Garnett* v. *Woodcock*, 1 Stark. 475. See also *Elford* v. *Teed*, 1 M. & S. 28.

COURTS IN INDIA.

In a recent number we gave some account of the Supreme Courts of India. We shall now add, from a contemporary, a short notice of the Provincial Courts.

The present system for the administration of justice in the provinces was first introduced by the Marquis of Cornwallis, in the year 1793. We shall confine our remarks to those provinces of Bengal into which the system was first introduced, and where it has now existed, with very little change, for near forty years; remarking that a similar arrangement exists in all other parts of the British dominions, with the exception of the provinces acquired since the year 1817. The country is divided into districts, called Zillahs, an Arabic term for a division of the country, which has reference to provincial jurisdiction. In each district there is a British officer, called "Judge or Magistrate." A certain number of these zillahs constitute a circuit, appellate, or provincial jurisdiction. There are six classes of Courts in all, viz. two native and four European. These are, beginning with the lowest, the courts of the Munsif, an inferior native commissioner; the court of the Sudder Ameen, or chief native commissioner; the court of the Register; the court of the Zillah Judge; the Provincial Court; and the Supreme Court for the whole presidency sitting at Calcutta. The four first courts are civil courts only, and the lowest native courts can only try suits for matters of provincial property. These consist each of a single judge, and the district judge has the assistance of a Hindoo and a Mahommedan law adviser. The civil jurisdiction of each court is generally determined by the amount or value of the property which can be sued for in them. In the lowest native court the amount is about 5*l*. sterling; in the highest native court, 50*l*.; and in the Register's court, 100*l*. Suits, however, cannot be instituted in the two last courts, and can only be referred to them at the discretion of the District Judge. They are held at the same place or station with the District Court; whereas the Courts of the inferior commissioners are spread over the district. An appeal generally lies from the three inferior Courts to the Court of the District Judge; from that of the District Judge to the Provincial Court; and from the Provincial Court to the chief Native Court of the Presidency—commonly called, in its civil jurisdiction, the Sudder Dewany,—Arabic words, which mean, Head Civil Court. From this again, where the matter in dispute exceeds the value of about 5,000*l*., there lies a final appeal to the King in Council. A case may in fact be carried, by way of appeal, at least four times over, from court to court. In the two Native Courts there are no written proceedings, the process being summary, like that of our courts of requests. In all the European Courts, the whole proceedings are taken in writing, and most preposterously, in the Persian language, in imitation of our Mahommedan predecessors. This language is always imperfectly, if at all, understood by the Judges, and never understood at all by the suitors; the only parties who do understand it being a few ill-paid native officers of the Court, of whom, however, it is never the vernacular language, any more than law-latin was the vernacular language of England when the records of our Courts were kept in that jargon.

The rules and process of the Company's superior Courts, where law was to be administered by unprofessional judges, with the assistance of a bar, and to a people ignorant of the English law and language, were framed by Sir Elijah Impey, the first King's Chief Justice in India, and who himself was constituted (and hence his recall and impeachment) Chief Judge of the Native Court. Sir Elijah was a clever, but pedantic common-place English lawyer, and framed the process on the complex and technical model of that of the English Courts.

The Provincial Courts of Appeal consist of a chief judge and two or three puisne judges; and the Supreme Court at the Presidency, of the same number. These two Courts have both a primary and appellate, as well as criminal jurisdiction; and one of the judges of the Provincial Courts proceeds periodically on circuit to each district within the division, to make gaol deliveries. No capital sentence can be carried into execution without the confirmation of the principal court at Calcutta, which in its criminal jurisdiction has the title of Sudder Nizamut Adawlut,—Arabic words, which mean, Chief Criminal Court of Justice. In the Company's courts there is no semblance of jury trial, either in civil or criminal cases; but there is a Bar, under the name of Vakeels or Pleaders—frequently an ignorant, and not unfrequently a very corrupt class,—such is general as would be designated in this country by the word "pettifogger." At this bar no Englishman, or any other Christian, is allowed to practise. It is to be observed that the Zillah, or District Judges, are the sole magistrates and justices of the peace within their respective jurisdiction, and that they have the entire superintendance of the police.

PROPOSED ALTERATIONS IN CHANCERY COSTS.

(*Continued from p* 184.)

Easter Term.	Present Charge. £ s. d.		Proposed Charge. £ s. d.
Notice of motion having been given to transfer money, &c. drawing brief for counsel to appear on motion, 1 sheet	0 6 8		0 6 8
Fair copy	0 3 4	There is no objection to these, except the clerk's fee	0 3 4
Copy notice motion to annex	0 1 0		0 1 0
Fee to Mr. ——, therewith, and clerk	1 3 6		1 1 0
Attending him	0 6 8		0 6 8
Attending court, motion made, order granted	0 13 4		0 13 4
Paid for copy minutes	0 5 6	This should be reduced to	0 3 0
Close copy	0 3 0	There is no objection to these	0 3 0
Attending settling same	0 6 8		0 6 8
Paid for office copy order	1 6 0	This should be reduced, both in the charge and in the length of the recitals, which would make it not more than	0 10 0
		There is no objection to this	0 6 8
Attending at Accountant General's, to bespeak, and for two certificates to transfer stock	0 6 8		
Paid filing same	0 11 0	This might be reduced to	0 6 0
Attending to bespeak, and for letter of attorney	0 6 8		0 6 8
Paid for same	1 5 6		1 5 6
Writing to correspondent to get same executed	0 5 0		0 5 0
Paid his charges	0 10 0		0 10 0
Attending to get power of attorney passed, and bespeak transfer	0 6 8		0 6 8
Attending to transfer stock	0 6 8		0 6 8
Paid commission	1 0 8		1 0 8
Instructions for affidavit of dividends received, in order to payment into the bank	0 6 8	There is no objection to these	0 6 8
Drawing affidavit, fo. 8.	0 8 0		0 8 0
Ingrossing same and oath	0 3 8		0 3 8
Paid for office copy thereof	0 2 8		0 2 8
Attending at Accountant-General's to bespeak, and for direction to pay in dividends, and to file receipt	0 13 4		0 13 4
Paid filing receipt	0 4 0	This should be reduced, say to	0 2 0
Paid for copy charge, fo. 8.	0 4 0	This should be reduced to	0 2 8
Warrant to proceed on charge, three copies and service	0 6 6	There is no objection to these	0 6 6
Attending same	0 6 8		0 6 8
Attending warrant to bring in discharge, when time given	0 6 8	Nor to these	0 6 8
Drawing discharge, and fair copy for the master, fo. 6.	0 4 0		0 4 0
Warrant on leaving three copies and service	0 6 6	All warrants on leaving might be dispensed with, by making the first warrant to proceed returnable in four days, which would give time to get copies.	
Warrant to proceed on discharge, three copies and service	0 6 6	There is no objection to these	0 6 6
Attending same	0 6 8		0 6 8
Paid for copy, state of facts of defendant, fo. 12	0 6 0	This should be reduced to	0 4 0

	Present Charge. £ s. d.		Proposed Charge. £ s. d.
Close copy	0 4 0	As close copies are frequently made, and are necessary, they should be allowed in all such cases, whether town or country causes	0 4 0
Attending warrant on state of facts	0 6 8	There is no objection to this	0 6 8
Term fee, letters, &c.	1 1 8	*Antè*	0 15 0
Trinity Term.			
Attending another warrant on state of facts	0 6 8	There is no objection to these	0 6 0
Drawing request to Accountant General, to lay out cash	0 2 6		0 2 6
Attending thereon	0 6 8		0 6 8
Paid	0 10 6	This is too much, and should be reduced to	0 5 0
Attending warrant to bring in deeds, &c.	0 6 8	There is no objection to these	0 6 8
Instructions for affidavit of production	0 6 8		0 6 8
Drawing same, fo. 18	0 18 0		0 18 0
Ingrossing same and oath	0 7 0		0 7 0
Attending with deponent to be sworn	0 6 8		0 6 8
Term fee, &c.	1 1 8	*Antè*	0 15 0
Michaelmas Term.			
Warrant to examine books, three copies and service	0 6 6	There is no objection to these	0 6 6
Attending same	0 6 8		0 6 8
Paid master's clerk	0 6 8	This should be disallowed.	
Attending to bespeak certificate of production, and to file same	0 6 8	There is no objection to this	0 6 8
Paid for certificate	1 7 6	This is too much, and ought to be reduced to about	0 7 6
Paid filing, and for office copy	0 3 10	This should be reduced to	0 2 0
Term fee, letters, &c.	1 1 8	*Antè*	0 15 0
Easter Term.			
Paid for copy draft report, fo. 126	3 3 0	This should be reduced to	2 2 0
Close copy	2 2 0	There is no objection to this	2 2 0
Warrant on preparing three copies and service	0 6 6	This might be dispensed with, by making the first warrant to settle returnable in four days.	
Warrant to settle, three copies and service	0 6 6	There is no objection to these	0 6 6
Attending same	0 6 8		0 6 8
Term fee, letters, &c.	1 1 8	*Antè*	0 15 0
Trinity Term.			
Three warrants to settle, draft report	0 19 6	There appears no objection to these	0 19 6
Attending same	1 0 0		1 0 0
Warrant to sign report, three copies and service	0 6 6		0 6 6
Attending same	0 6 8		0 6 8
Instructions for objections to draft report	0 6 8	The taking of objections to a report is generally useless, and might be discontinued with advantage: it only creates additional expense, without any benefit to the suitor.	
Drawing objections and copy, fo. 16	0 16 0		
Fee to Mr. —— to settle, and clerk	1 3 6		
Attending him	0 6 8		
Fair copy objections to lay before the master	0 5 4		
Warrant on leaving same	0 6 6		
The like to proceed	0 6 6		
Attending same	0 6 8		

	Present Charge. £ s. d.		Proposed Charge. £ s. d.
Paid for general report, transcribing, &c.	4 7 0	This is too much, and might well be reduced at least one half	2 3 6
Paid master's clerk	3 3 0	This is a heavy charge; but as it is an inducement to the Master's clerk to proceed with celerity, I do not think it would be prudent to discontinue it	3 3 0
Paid filing and for office copy	3 8 0	This should be reduced, at least one half	1 14 0
Attending to file, and for office copy	0 6 8	There is no objection to this	0 6 8
Instructions to counsel to move to confirm report *nisi*	0 2 6	The whole of this proceeding might be dispensed with, by substituting for it— Drawing notice of motion to confirm report absolute, three copies and service	0 8 0
Fee to him to move	0 10 6		
Attending him	0 6 8		
Paid for order	0 6 0		
Paid entering	0 1 6		
Three copies and service	0 19 6		
Drawing and ingrossing affidavit of service of order and oath	0 6 6		
Paid filing, and for office copy	0 4 0		
Paid for certificate of no cause shewn	0 2 0		
Instructions to counsel to move to confirm absolute	0 2 6	If the above proposition were carried into effect, counsel's fee would have to be increased to *Il.* 1*s.*; there is no objection to the others.	0 2 6 1 1 0 0 6 8 0 3 0
Fee to him to move	0 10 6		
Attending him and court	0 6 8		
Paid on bespeaking order	0 3 0		
Term fee, &c.	1 1 8	*Antè*	0 15 0

[*To be continued.*]

UNIFORMITY OF PROCESS ACT.

No. V.

The eighteenth section empowers the judges to make rules and orders for the government and conduct of the ministers and officers of their respective courts as to the distribution and performance of the duties necessary in the execution of this act; provided that no additional charge be imposed on the suitors.

The nineteenth section saves all exemptions now in existence from arrest, outlawry, or waiver, and prevents the operation of the act in causes removed into either of the courts by writ of *pone*, *certiorari*, *recordari*, *facias*, *loquelam*, *habeas corpus*, or otherwise.

By sec. 22, parts of counties lying within other counties are to be deemed, for the purpose of service and execution of every writ and process, whether *mesne* or judicial, issued out of any of the courts, part of the county wherein such district may be, as well as of the county of which it is a part. We have already remarked on the form of affidavit which will be necessary for the future in order to set aside service of process, on the ground of its having been served in a wrong county. We will here, in addition, observe, that there is a distinction between the writ of summons mentioned in the first section, and the writ of *capias* mentioned in the fourth. The writ of summons may be served within 200 yards of the border of the county into which it is issued; but no such facility is afforded for the service of the *capias*. Where the service of the *capias* is in a wrong county, but that portion of the wrong county is not within the county into which the process issues, the old affidavit will suffice. Where it is within the county into which the process issues, by sec. 10. it will be no irregularity.

The twenty-first section directs that the writs provided in this statute shall be the only ones for the commencement of personal actions in any of the Superior Courts of Law at Westminster, in cases to which such writs are applicable. The costs to be allowed and charged for such writs are to be the same as those on writs of *latitat*. There is a saving, however, of the franchises and jurisdictions of the counties palatine of Lancaster and Durham.

The remaining sections, 22 and 23, pro-

vide for the commencement of the act on the first day of Michaelmas term next, and the alteration, amendment, or repeal of the act during the present Session.

Before we leave the subject of the present act, we think it right to recur to a matter we discussed in our first article on it, with respect to the question, whether process by original was abolished by this act? It has been suggested, that as the words at the commencement of the section are "Process for the commencement of personal actions in his Majesty's Superior Courts of *Law at Westminster*," and as the original issues out of the Law side of the Court of Chancery, which is at *Westminster*, that process is in fact abolished. If so, then the Court of Chancery is recognized by this act as a Court of Law, and therefore there is no reason why the new process provided by the present statute should not be issued from that Court also. This Court being so recognized as a Court of Law, by a modern act of parliament, it may be contended, and with some force, that the whole common law jurisdiction anciently possessed by it is revived. That Court formerly had jurisdiction to hold plea upon a *scire facias*, to repeal and cancel the King's letters patent, when made against law or upon untrue suggestions, and to hold plea of petitions *monstrans de droit*, traverses of offices, and the like, when the King hath been advised to do any act, or is put into possession of any lands or goods, in prejudice of a subject's right, 4 Rep. 35. It also appertains to this Court to hold plea of all personal actions, where any officer or minister of the Court is a party; 4 Inst. 80. It might likewise hold plea (by *scire facias*) of partitions of lands in coparcenary, Co. Litt. 171, F. N. B. 62; and of Dower, Bro. Abr. tit. "*Dower*," 66; Moore, 565; where any ward of the Crown was concerned in interest, so long as the military tenures subsisted, as it now may also do of the tithes of forest land, where granted by the King and claimed by a stranger, against the grantee of the Crown; Bro. Abr. tit. "*Disters*," 10; and of executions on statutes or recognizances in nature thereof, by the stat. 23 Hen. 8, c. 6; Roll. Abr. 469. But if any cause comes to issue in this Court; that is, if any fact be disputed between the parties, the Chancellor cannot try it, having no power to summon a jury, but must deliver the record *propria manu*, into the Court of King's Bench, where it shall be tried by the country, and judgment shall be there given thereon; Cro. Jac. 12; Latch 112. And when judgment is given in Chancery upon demurrer, or the like, a writ of error, in nature of an appeal, lies out of this ordinary Court into the Court of King's Bench; Yearbook, 18 Edw. 3, 25, 17; Ass. 24, 29; Ass. 47; Dyer, 315; 1 Roll. Rep. 287; 4 Inst. 80. Lord Keeper *North*, however, in the year 1682, 1 Vern. 131; 1 Eq. Cas. Abr. 129, hazarded an opinion, that no such writ of error lay, and that an injunction might be issued against it; but Mr. Justice *Blackstone*, 3 Com. 49, was of opinion, that that suggestion was not well considered. Mr. Justice *Blackstone*, however, observes, that "so little is usually done on the common law side of the Court, that I have met with no traces of any writ of error being actually brought since the 14th year of Queen Elizabeth, *ann. dom.* 1572." If it should be holden, that this common law jurisdiction was revived, a curious question would then arise, as to how a writ of error to any judgment pronounced on the law side of the Court of Chancery would be returnable. The 11 G. 4, and 1 W. 4. c. 70, § 8, only apply to the King's Bench, Common Pleas, and Exchequer; 1 Dowl. Stat. 373; and therefore, although under that statute, writs of error to the judgment of any one of those three Courts would be returnable before the Judges, or the Judges and Barons of the other two Courts in the Exchequer Chamber, a writ of error to a judgment pronounced on the law side of the Court of Chancery, would still be returnable in the Court of King's Bench, in the same manner that a writ of error to a judgment of the Common Pleas was returnable in the King's Bench before the passing of the last cited act.

But, as from the language of the preamble, the purview of the statute was to remedy the "great variety and multiplicity" of process for the commencement of personal actions, it is to be presumed that the legislature intended to abolish original writs; and as in point of actual practice, actions by original are commenced in the Superior Courts themselves, it is most probable the act would be construed as taking away that process. By adopting this mode of construction, instead of that by which the Court of Chancery is considered as one of the Courts of Law at *Westminster*, none of the difficulties, real or supposed, consequent on the latter construction, can arise.

STATE OF THE LAW OF REAL PROPERTY IN AMERICA.

We again revert to the very useful book of Mr. Vigne on America, according to which Entailed Estates are but little known in the United States.

"In South Carolina, Georgia, and Louisiana, not at all. In many of the states they are nothing in effect but an estate in fee; the limitation in tail being of no value, except it be in special tail. But in all cases estates tail may be barred by a simple deed of bargain and sale, and which is, in fact, the almost universal assurance; lease and release being but little known. In other respects the doctrine of the statutes of uses is in full operation, excepting in the state of New York, where it has been discontinued since the new code passed in 1829." * * *

"The system of entails in England is considered by the Americans as highly pernicious; but their idea of its extent is far beyond the truth. On this head I have heard great ignorance displayed by them. Some think that an entailed estate cannot be destroyed at all; but that an entailed estate cannot, in any case, be destroyed without the consent of the eldest son, is the more common error; one which is prevalent with the uninitiated even in England, and is, of course, still more so among the Americans, who are but little aware than an estate cannot, in any case, be rendered unalienable for more than one generation; or, technically speaking, for more than a life or lives in being, and twenty-one years afterwards. This rule has been a favourite with English lawyers, because, on the one hand, it prevents landed property from being unavailable for commercial purposes for a longer period than one generation; and, on the other, it makes reasonable allowance for the English policy of keeping up the families of our nobility and gentry. From whence then does the vulgar error principally arise? From this circumstance: under the usual form of settlement, the father has the present enjoyment of the estate, and the son has the inheritance in tail in expectancy; and in this case the father and son, as soon as the latter is of age, may do what they please with the estate; and it is a very common arrangement for them to agree to make a fresh settlement, which ties up the estate for another generation. But this is only an exercise of their absolute power of disposal, which they might, if they pleased, exercise by selling the estate, or otherwise getting rid of it. If no fresh settlement has been made, and the son outlives the father, he alone may do what he pleases with the estate, without asking the consent of his eldest son or of any other person. The Americans are little aware that there is not a nobleman's estate in the country, with the exception of Blenheim, Strathfieldsay, and perhaps half a dozen others, where the reversion is in the crown under some very old grant, which could not be absolutely disposed of, *once, at least*, in every generation. That there is a power of making unalienable entails in Scotland, (with irritant and resolutive clauses, as the Scotch lawyers have it,) where the person making them is not indebted at the time, is a truth which I do not conceive could have given rise to the error respecting those in England."

The Law of Mortgage is, generally speaking, much the same as in England.

From another part of the author's work we notice his statement of the Law in Lower Canada in regard to Dower and Mortgage, both of which, he observes, are often productive of great confusion and actual injustice.

"Supposing there has been no renunciation of her dower by the marriage contract, the wife upon her marriage is entitled to a dower of one-half of the estate of inheritance then in the possession of her husband; and this dower is of itself an estate of inheritance which descends to her children, supposing they take nothing by the 'communauté,' an arrangement by which the wife is entitled to one-half of all property real and personal, acquired subsequently to the marriage. A communauté may exist with a settlement or without one, as in the case I have proposed. At the death of the wife in the life-time of the husband, or *vice versâ*, the law permits the children to elect—between one-half of the property in communauté to be enjoyed immediately, and the real estate which would have formed the dower of the wife had she survived her husband, which is not to be divided amongst them till after the death of the surviving parent. It sometimes happens that the husband and wife have joined in the sale of the estate, perhaps for the present benefit of the children, and with their knowledge. This sale, however, cannot deprive the children of their estate of inheritance in the dower after the decease of the wife, and although it is justly reckoned disgraceful for the children to claim the estate from a purchaser under such circumstances, yet it is sometimes done in cases where there was nothing left to be divided in communauté. A gentleman informed me that such an instance had occurred to himself. He had purchased an estate, and had been in possession about twenty years. It had been sold by the husband and wife upwards of forty years; but they were both still living, and he was much surprised one day at being informed by the children, that at the decease of their mother, they intended to come upon him for the amount of the dower, as there was no prospect of receiving any thing by the communauté.

"Till lately, under the then existing law of mortgage, a purchaser could seldom be sure of buying an unincumbered estate; a previous possessor in want of money might have been before a notary and have borrowed of a dozen different persons, on what is called a tacit mortgage. No title deeds were required by the lender, but all the property of the borrower

is liable for the amount borrowed; and claims of this kind were constantly made upon estates even after the possessor, who had taken all pains to clear them off, had reason to think himself secure in the enjoyment of them. But by a bill that passed the legislature in 1828, newly purchased property is cleared against creditors who do not put in their claims within four months, the rights of widows and minors forming an exception."

REMANENT CAUSES AND REMANENT FEES.

To the Editor of the Legal Observer.

SIR,

The evil arising to suitors from the arrear of causes in the King's Bench, is rapidly increasing, and will soon, if no remedy be applied, become intolerable. No fewer than 957 causes, standing for trial in that Court, were made *remanent* at the late sittings, and this too when there are fifteen Judges, and many of them were at the time unoccupied. Surely a second court of *nisi prius* might be formed, to sit at the same time as the Chief Justice, until the arrear was materially diminished; but while 957 *remanent* causes produce every term at least 478*l.* 10*s.* to the Marshal, there is no motive, in a certain quarter, for decreasing the number [a]. Probably 100 or more cases on bills, bonds, and notes, might have been disposed of in a day or a day and a half at the late sittings, had that time been devoted to it.

The foregoing suggestions are merely of palliatives; but why should not the absurd limitation of the *nisi prius* sittings to 28 days after term, be repealed, and the Judges, when not engaged on the circuit, sit in turn out of term, until the arrear is disposed of? I am, Sir, YOUR CONSTANT READER.

SUPERIOR COURTS.

ROLLS COURT.

LETTER.—MARRIAGE SETTLEMENT.

A young lady being about to be married, an elderly lady who had, subject to the life estates of herself and her husband, a power of appointment over a considerable property, wrote to the mother of the young lady stating the particulars of that property, and how she had disposed of it by her will, thereby having made a considerable provision for this young lady. The marriage took place.

HELD, *that this letter did not prevent the writer of it from disposing of her property, or incumbering it as she thought fit, and that no reversionary interest passed by it.*

A question arose, on the petition of Mr. Carew, the defendant, under the Land Tax Act, regarding the surplus of monies which had been raised for the purpose of redeeming some land tax, by the sale of a farm, by Mr. and Mrs. Barnard, the late possessors of the large family estate, and who were tenants for life; and Mrs. Barnard had a power of appointment of the whole property. The petitioner alleged that he was entitled to the reversion, which involved, incidentally, the question whether a certain letter, stating the substance of her will, were a binding irrevocable execution of the power. A daughter of Mrs. Hamilton having received the addresses of Captain Warrington, that lady mentioned it in her correspondence with Mrs. Barnard, from whom her family had considerable expectations, and who then sent Mrs. Hamilton a letter dated the 15th February 1795, wherein she says, that she felt almost an equal interest with herself in her daughter's welfare; and after some other kind expressions and friendly hints, proceeds as follows:—"You say their income, if they come together, will not be much more than 600*l.* per annum for the present. This I fear will be a scanty income according to the present mode of living, and they will feel some inconvenience therefrom, and I am sorry it is not in my power to augment it during the lives of Mr. Barnard and myself; but if they come together, they must attend to what the old adage recommends,—cut their coats according to their cloth. If they can make a shift to curtail their wishes for a few years, they will have hereafter a more ample field for enlarging their comforts and enjoyments. In order that you and they may know what prospects they will have to look forward to, I have desired Mr. Barnard to make out a full, clear, and candid state of my affairs and circumstances, and to state to you what I have done for your daughters, and what my future intentions with respect to them are; and I will inclose it herein. Wishing you and them every degree of happiness, and with best regards to Mr. Hamilton, in all which Mr. Barnard most cordially joins, I remain, my dear Mrs. Hamilton,

"Your affectionate kinswoman and friend,
"E. B."

This letter was accompanied by the following estimate:—"A general statement of my several manors and estates, which I possess, and over which I have a disposing power, after Mr. Barnard's and my own life, but which are subject to the several incumbrances hereinafter mentioned." This statement then sets forth a manor, mansion, and several farms, the rentals of which amounted to - - £2060
Estates in reversion - - 500
Advowson - - - 200
£2760

[a] We do not believe that any such unworthy motive as here ascribed can operate on the mind of the Chief Justice; but it is certainly desirable that there should be no ground for suspecting it. ED.

Three debts were then set forth, amounting to the sum of 16,200*l.*, and then follows the following observations:

"This, then, is the property I have to dispose of, and which I will candidly tell you I have disposed of by my will, made some time ago, in the following manner.—I have given all my estates whatsoever to trustees upon trust, first, for your eldest daughter Mary Carew and her issue (subject to the before mentioned incumbrances); and I have given your youngest daughter, Elizabeth Carew, 5000*l.*, to be paid her by my trustees, out of my said estates; and in default of issue of your daughter Mary, I have given the said estates to your daughter Elizabeth and her issue, in like manner; and I have directed, that whoever shall come into possession of the said estates, shall take and use the name and arms of Carew only, and if they neglect or refuse to do so, the bequest as to such persons shall be void, and the next in remainder shall take the estates, conforming to the said direction." The marriage afterwards took place, and Captain Warrington took the name of Carew; and he and his wife were defendants in this suit.

Mr. *Bickersteth* and Mr. *Swanston* for the petitioner, contended, that the parties married upon the representations of Mrs. Barnard, and that there were such terms in that letter, that she would not be afterwards permitted to revoke her will, to the prejudice of the parties.

Mr. *Pemberton*, on the other hand, contended, that this letter was not written with reference to the marriage in particular, but merely to convey information of what she had done by her will. She did not thereby bind herself to any one; and what she had done was no more with reference to this marriage than to any other. The letter was not written as an inducement to the marriage, for the bounty mentioned was not dependent upon the marriage. To say that this representation shall be changed into a certainty, is an extraordinary perversion of language; there is no proof that this letter was ever communicated to Mr. Carew before marriage, or to the lady who was afterwards his wife; it was merely a confidential communication, and not one that would prevent her from incumbering her property, or otherwise dealing with it.

Master of the Rolls.—I am not of opinion here that these parties became entitled to the reversion under Mrs. Barnard's letter and statement; the question is, whether she meant to take from herself the absolute power of disposing of one shilling of her property, or whether she meant to point out what her property was, and what were the prospects of Mrs. Hamilton's children upon it: the true meaning of this letter is,—"I have the kindest intentions towards your daughter; and I will tell you what I mean to do for her:" but she did not mean to bind herself by any obligation; and I am of opinion, that the defendants took no reversionary interest in the property.—*Hellyer v. Carew*, 13th Feb. 1832. M. R.

KING'S BENCH.—PRACTICE COURT.

COGNOVIT.—BANKRUPT.—WARRANT OF ATTORNEY.

A judgment and execution on a cognovit *not filed according to the provisions of the* 3 G. 4. *c.* 39, *are not absolutely void, but only inoperative against the assignees of a bankrupt.*

A cognovit *does not require a stamp, though containing a stipulation not to take advantage of its being given before declaration.*

Butt shewed cause against a rule obtained by *Channel*, for setting aside the judgment signed and the execution issued in this case, and for the payment of costs of this application by the plaintiff. The present application was made by the assignees of a bankrupt named *Gray*, to set aside the judgment and subsequent proceedings on a *cognovit* given by the bankrupt, which *cognovit* was not filed according to the directions of the 3 G. 4. c. 39. § 3. The question in the present case is, whether the *cognovit*, under these circumstances, is absolutely void, or only inoperative as against the assignees. The third section is in these terms: "that every *cognovit actionem* given by any defendant, in any personal action, in case the action in which such *cognovit actionem* shall be given, shall be in the said Court of King's Bench, or a true copy of such *cognovit actionem*, in case the action wherein the same is given shall be in any other Court, shall, together with an affidavit of the time of the execution thereof, be filed with the said writ, in like manner as such warrants of attorney, or copies thereof, and affidavits, within the space of twenty-one days after such *cognovit actionem* shall have been executed; such *cognovit actionem*, and any judgment entered up thereon, and any execution taken out on such judgment, shall be deemed fraudulent and void, against the assignees of the person giving such *cognovit actionem*, under a commission of bankrupt issued against him after the expiration of the said space of twenty-one days, in like manner as warrants of attorney and judgments, and execution thereon, are deemed and taken to be fraudulent and void by this act." The previous section (§ 2) makes certain provisions as to warrants of attorney, in these terms: "if, at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, under which he shall be duly found and declared a bankrupt, then, and in such case, unless such warrant of attorney, or a copy thereof, shall have been filed as aforesaid, within the space of twenty-one days from the execution thereof, or unless judgment shall have been signed, or execution issued on such warrant of attorney within the same period, such warrant of attorney and the judgment and execution thereon shall be deemed fraudulent and void against the assignees under such commission; and such assignees shall be intitled to recover back and receive, for the use

of the creditors of such bankrupt at large, all and every the monies levied or effects seized under and by virtue of such judgment and execution." The third section thus referring to the second, and making *cognovits* void in like manner as warrants of attorney under the second section, unless a warrant of attorney would be absolutely void, a *cognovit* will not be absolutely void. There is no decision directly on this section; but I submit, that on the language of the two clauses, the *cognovit* is only inoperative as against the assignees; any money levied under the execution, they might recover back. The cases of *Morris* v. *Mellin*[a], and *Bennett* v. *Daniel*[b], were on the fourth section, which provides, "that if such warrant of attorney or *cognovit* shall be given, subject to any defeasance or condition, such defeasance or condition shall be written on the same paper or parchment on which such warrant of attorney or *cognovit actionem* shall be written, before the time when the same or a copy thereof respectively shall be filed, otherwise such warrant of attorney or *cognovit actionem* shall be *null and void to all intents and purposes.*" The Court in those two cases was of opinion, that the warrant, though not written on the same paper or parchment, was void only against the assignees of a bankrupt, and not void as against other persons. One of the Judges, in each of those cases, thought differently; but the three others were of that opinion. But in section 4, the words "null and void to all intents and purposes," occur, but do not occur in section 3. The language of the latter section must be considered therefore as less extensive than that of section 4. Lord *Tenterden*, in the case of *Morris* v. *Mellin*, observed, "If we were to give to the fourth section the effect we are called upon to do, it would apply to all warrants of attorney; and it would have the effect of protecting creditors, although no commission of bankrupt had issued against the debtor who gave the warrant of attorney, and it would render it void in favour of the party himself." And again, "We should even enable a party who gave the warrant of attorney to treat it as a nullity on that ground." It is clear, from this language of Lord *Tenterden*, that the *cognovit* must be taken as inoperative against the assignees, and not as void against all the world. Suppose the bankrupt's estate to pay twenty shillings in the pound, and the commission consequently to be superseded[c], the plaintiff would clearly be entitled to the benefit of the judgment entered up on the *cognovit*. But if it were to be considered as void against all the world, he would be deprived of that benefit. Again, a judgment binds lands from the time at which it is signed. Now, suppose a party had given such a *cognovit* as the present, and on which judgment is signed.—The judgment creditor thus acquires a lien on the land—the judgment debtor then becomes bankrupt, under circumstances, which would give his assignees no right against the lien. But if the assignees could, under the statute now relied on, set aside the judgment on the ground urged in this case, they would thus destroy the judgment creditor's lien, and do that indirectly which they could not do directly. Or, suppose the commission to be superseded on the ground of its having improperly issued, the plaintiff would still be entitled to the benefit of his judgment on the *cognovit*; but if it were to be declared null and void on account of the commission issuing, he would not be able to avail himself of the judgment. It may perhaps be contended, that although not absolutely void against all the world, it is absolutely void against the assignees. But that mode of treating it is, in fact, the same as treating it as void against all the world. A second objection in the present case is, that the *cognovit* is not stamped. The cases of *Eames* v. *Hill*[d]; *Reardon* v. *Swabey*[e]; *Jay* v. *Warren*[f]; shew that a stamp is not necessary on a *cognovit*.

Channel, contrà, admitted that the *cognovit* was not void as against all the world, but submitted that it was absolutely void as against the assignees. The observations of Mr. Justice *Holroyd*, in *Hurst* v. *Jennings*[g], seemed to go to that extent. There it was held, that an indenture, by virtue of which the judgment there as entered up, was a *cognovit actionem*, within the meaning of the third section of the 3 Geo. 4. c. 39; or if not, that it was a contrivance to defeat the provisions of that statute; and the indenture not having been filed with the proper officer within twenty-one days after its execution, and judgment not having been entered up within that period, as required by the statute,[h] the Court upon application by the assignees of the obligor, who had become bankrupt, ordered the execution to be withdrawn. There Lord *Tenterden* said, "If we see that the execution has issued on a judgment which has been obtained by means of a contrivance devised to evade the provisions of an act of parliament, or any rule of the common law, we ought not to allow the execution to continue in force so as to have that effect. I am clearly of opinion, that the bond and indenture by which the plaintiffs were authorized to enter up judgment and sue out execution, were devised with the intention to evade the provisions of the 3 Geo. 4. c. 39." Mr. Justice *Holroyd* said, "I think that this execution ought to be set aside. This is a case either within the act of parliament, or the deed and judgment were a contrivance to defeat the provisions of it. By the first section, every warrant of attorney must be filed within twenty-one days after execution, in the manner therein mentioned. By section 2, "if it has not been filed within that time, it is to be deemed fraudulent, and void against the assignees under any commission of bankrupt afterwards issued against the party

[a] 6 B. & C. 446.
[b] 10 B. & C. 500.
[c] See Archbold's Bankruptcy, 217, ed. 3.
[d] 2 B. & P. 150.
[e] 4 East, 188.
[f] 1 C. & P. 532.
[g] 5 B. & C. 650.
[h] See 1 Tidd Prac. 560. ed. 9.

giving the warrant." It is clear, therefore, that if the instrument in this case had been a warrant of attorney instead of a bond and indenture, the judgment and execution would have been void against the assignees, because the provisions of the statute had not been complied with. From this it should seem that he was of opinion, that if the provisions of the statute were not complied with, a warrant of attorney would be void. The third section placing *cognovits* on the same footing as warrants of attorney, he would be of opinion in the present case, that the *cognovit* was void. As to the second point, namely, the stamping, it was true that the *cognovit* did not require a stamp unless it contained terms of agreement. But there are stipulations contained in this.

Taunton, J.—There are no stipulations contained in it which may not be found in every *cognovit*. If they constituted an agreement, then every *cognovit* would require a stamp; but the Courts have said, that a *cognovit* does not require a stamp.

Channel.—The defendant agrees, in addition to the general stipulation, that no writ of error shall be brought or bill in equity filed, that he will take no advantage of the fact of the *cognovit* being given before declaration. It is contrary to the practice of the Court to give a *cognovit* until after declaration, since the *cognovit* being a confession of the action, and the nature of the action not being known until the plaintiff has declared, he cannot confess it until then [1].

Taunton, J.—This rule calls upon the plaintiff to shew cause why the judgment signed and execution issued thereon should not be set aside, and why the plaintiff should not pay the costs of this application. The rule is moved for on § 3. of the 3 Geo. 4. c. 39. The words of that section are, "every *cognovit actionem* given by any defendant in any personal action, in case the action in which such *cognovit actionem* shall be given, shall be in the said Court of King's Bench, or a true copy of such *cognovit actionem* in case the action wherein the same is given shall be in any other Court shall, together with an affidavit of the time of the execution thereof, be filed with the said clerk, in like manner as such warrants of attorney or copies thereof, and affidavits within the space of twenty-one days after such *cognovit actionem* shall have been executed; otherwise such *cognovit actionem*, and any judgment entered up thereon, and any execution taken out on such judgment, shall be deemed fraudulent and void against the assignees of the person giving such *cognovit actionem*, under a commission of bankrupt, issued against him after the expiration of the said space of twenty-one days, in like manner as warrants of attorney, and judgments, and executions thereon, are deemed and taken to be fraudulent and void by this act." That is, therefore, putting judgments and executions on *cognovits* on the same footing as judgments and executions on warrants of attorney are put, by the second section, and the same consequences are to follow. That renders it necessary to see the provisions of the former section, as to judgments and executions on warrants of attorney. Section 2 is in these words, "such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees under such commission; and such assignees shall be entitled to recover back and receive, for the use of the creditors of such bankrupt at large, all and every the monies levied or effects seized under and by virtue of such judgment and execution." Now this application has been made on behalf of the assignees of *Gray*, the defendant; and it is said, that as the statute has declared the judgment and execution in such a case fraudulent and void against a commission of bankrupt, they are fraudulent and void against all the world; and, therefore, that the rule ought to be made absolute for setting aside the judgment and execution. But I think that this rule ought not to be made absolute. I am of opinion that the statute expressly limits the consequences of not filing the *cognovits* within a given time, to the enabling the assignees of the bankrupt to recover back and receive for the benefit of the creditors the proceeds of the judgment and execution thereon. It does not follow, that because the judgment and execution are to be void for that particular purpose, that they are to be void for all purposes. Supposing this bankrupt's estate to pay twenty shillings in the pound, when the commission would be superseded *de jure*, the plaintiff would be entitled to the benefit of this judgment. For, when the commission is at an end, it is as if no commission had issued. It is too much to say that the judgment and execution are void for all purposes, because it is void for one purpose. Then as to the point of a stamp being necessary on the *cognovit*. It is not an agreement, for an agreement imports

[1] 1 Tidd. Prac. 559, ed. 9. By the 1 W. 4, c. 7, § 7, the 108th section of the 6 Geo. 4, c. 16, is modified. The proviso of § 108 of 6 G. 4, c. 16, is, "provided that no creditor, though for a valuable consideration, who shall sue out any execution upon any judgment, obtained by default, confession, or *nil dicit*, or shall avail himself of such execution, to the prejudice of other fair creditors, but shall be paid rateably with such creditors." The 7th section of the 1 W. 4, c. 7, provides, "that no judgment signed, or execution issued, after the passing of this act, on a *cognovit actionem*, signed after declaration filed or delivered, or judgment by default, confession, or *nil dicit*, according to the practice of the Court, in any action commenced adversely, and not by collusion for the purpose of fraudulent preference, shall be deemed or taken to be within the said provision of the said recited act." In the above *cognovit* the defendant could not have agreed to waive the objection arising on this latter act, as any objection on it must be made by the assignees. See 2 Dowling's Statutes, 18, n. (*f*).

something to be done on both sides. But there does not appear to be any mutuality in this *cognovit*, and, therefore, this is not one of those cases in which the instrument ought to be stamped. The present rule must, therefore, be discharged.

Rule discharged. — *Green* v. *Gray*, E. T. April 28th, 1832. K. B. P. C.

SERVICE IN EJECTMENT.

What is a sufficient acknowledgment by a tenant in possession of receiving a declaration in ejectment.

Platt moved for judgment against the casual ejector. The tenant in possession was sworn to have acknowledged the receipt of the declaration "about the latter end of February."

Taunton, J.—As that receipt was clearly before the first day of the present term, that is sufficient.

Rule granted.—*Doe* v. *Roe*, E. T. 30th April, 1832. K. B. P. C.

JUDGMENT AS IN CASE OF A NONSUIT.

A separate motion is not necessary for the costs of the day for not proceeding to trial, where the rule for judgment as in case of a nonsuit is discharged.

On discharging a rule for judgment as in case of a nonsuit, for not proceeding to trial, *Taunton*, J. said, he would grant the costs of the day for not proceeding to trial, as a separate part of the order, but not as a condition of discharging the rule. It was not, therefore, necessary to make a separate motion for the costs, under the sixty-ninth rule of the first division of the rules of Hilary Term, 2 W. 4.

Justice shewed cause, and

V. Richards supported the rule.

Rule discharged, and the plaintiff ordered to pay the costs of the day for not proceeding to trial.

Piercy and Another v. *Owen*, E. T. April 30th, 1832. K. B. P. C.

WARRANT OF ATTORNEY.—SURVIVORSHIP.

On a warrant of attorney to confess judgment to two, judgment may be entered up in favour of a survivor.

Mansel applied for judgment on an old warrant of attorney. It had been originally given to confess a judgment to two persons: one had died, and the application now was, to have judgment entered up in favour of the survivor. He cited *Fendall and others* v. *May* [a], where a warrant of attorney having been given to confess judgment to three, and one died, the Court permitted judgment to be entered up by the survivors.

Taunton, J.—You may take your rule. The judgment being here to be entered up by survivors, and not *against* survivors, the authority of the warrant of attorney *is thus substantially pursued*.

Rule granted [b]. *Anonymous*, E. T. April 30th, 1832.

[a] 2 M. & S. 76.

NOTES OF THE WEEK.

House of Lords.

FINES AND RECOVERIES.—LIMITATION OF ACTIONS.—INHERITANCE.—CURTESY.—SHERIFFS' EXPENSES.

These Bills continue "waiting for second reading." It was confidently reported a few days ago that the Fines and Recoveries Bill had been withdrawn, but it does not appear so by the votes of the House. Considerable inconvenience results from this delay of disposing of the measure. In expectation of its passing, numerous fines and recoveries are suspended.

ANATOMY.

This Bill has been returned from the Commons, with their Lordship's amendments agreed to.

LUNATICS.

Read a third time, and passed with amendments.

COURT OF DELEGATES.

Bill read a second time, and committed.

SENTENCE OF DEATH.

This Bill still waits for the report.

House of Commons.

USURY.

Waiting for second reading.

[b] See *Gee* v. *Lane*, 15 East, 592; *Todd* v. *Todd*, S. C. Barnes. 48, by the name of *Todd* v. *Dodd*, 1 Wils. 312; *Fitcher* v. *Smith*, Bl. R. 1301.

FORGERY.—SEWERS.—LUNATICS' COMMISSIONS.

The reports on these Bills wait for further consideration.

ARBITRATION.—ECCLESIASTICAL COURTS CONTEMPTS.

Waiting for Committee. The evil of suspense is felt by the long protracted fate of the former of these Bills. Several actions on mercantile accounts are postponed from sitting to sitting, in expectation that the expense of a trial will be saved.

SITTINGS AT THE ROLLS.

The Master of the Rolls will take *Causes*, *Further Directions*, and *Petitions by Consent*, on Tuesday next the 31st instant, at eleven o'clock in the morning.

His Honor will afterwards take such *Further Directions* in the general paper as remain undisposed of.

Secretary's Office,
Rolls, 25th July, 1832.

YORK ASSIZES.

We understand that those Assizes will be held after those of Lancaster, which commence on the 13th of August; but the arrangement is not yet officially announced.

ANSWERS TO QUERIES.

COMMON LAW.

EXECUTION.—BANKRUPTCY. P. 176.

Under the circumstances stated by "A Constant Subscriber," I think the assignees have no claim to the amount levied, but that the plaintiff is entitled to the produce of the levy. My opinion is founded on a decision of the Court of King's Bench upon the following facts: The goods of a defendant having been seized under a *fi. fa.*, the amount of the levy was paid by him on the 1st May, and on the 2d he committed an act of bankruptcy, upon which a commission subsequently issued; on the 19th of the same month, the sheriff paid the proceeds of the levy to the execution creditor: and it was held, that he was entitled to retain it against the assignees, he not being a creditor having security when the act of bankruptcy was committed. *Vide* 8 B. & C. 722.

W. H. L.

EXECUTION.—BANKRUPTCY. P. 176—191.

The cases your correspondent "MANCUNIENSIS" refers to, certainly establish his doctrine, so far as regards executions on warrants of attorney or judgments by default, as the law stood at the time of those decisions; but my question applies as to an *execution on judgment* by default *after action brought*. As the law now stands amended by the 7th sec. of 1 W. 4. c. 7, and as to *execution* on *postea* after *verdict*, see *Wymer* v. *Kemble and another*, 6 B. & C. p. 479.

A CONSTANT SUBSCRIBER.

SHAM PLEA. P. 176.

In the case put by R. B., the plaintiff would, I think, be authorized to treat the plea as a nullity, and sign judgment (if palpably put in for delay only); or that the Court would, upon application, set it aside with costs, for want of being verified by affidavit. 6 M. & S. 133; and 1 Str. 639.

W. H. L.

LAW OF LANDLORD AND TENANT.

RENT. P. 176.

1. The query of J. S. is not quite so clearly expressed as could be wished; but presuming that *B.* was the assignee of the lease originally granted to *A.*, I think no action can be maintained against *B.* for rent that accrued due prior to his assignment; but as the lessor, in addition to his remedy by action against *A.* for breach of covenant, may distrain the goods of *B.*, the occupier, for the arrears that accrued during *A.*'s tenancy, *B.* may, I think, in the event of such distress being made, pay the amount, and recover the same from *A.*, in an action for money paid to his use.

W. H. L.

2. I think that *B.* is liable for the arrears due in respect of *A.*'s tenancy. The landlord is always authorized to seize on the premises; and I can find no reason why he should be debarred from it in this case. *A.* assures *B.* that all rent is paid up; but *B.* should have required the production of the receipts or vouchers from the landlord, to show such to be the case.

E. F.

LEASE FOR A YEAR.—PROGRESSIVE STAMPS. P. 175, *ante*.

How does your correspondent X. Y. Z., in his answer to your querist W. R. C., upon the question of whether or not a progressive duty is necessary upon leases for a year exceeding thirty folios, in coming to the decision that it is not necessary, dispose of the last clause in the schedule to the act, under the head "Bargain and Sale," beginning, "And where *any* such bargain and sale *as aforesaid*," &c.

T. P.

LAW OF PROPERTY AND CONVEYANCING.

LAPSED LEGACY. P. 192 *antè.*

In the case put by A. Z. of a gift by a testator of a life interest (in personal estate of course) to his widow, and of the corpus of the estate to be divided among his children at her decease, and of one of such children having survived the testator, and died in the life-time of the tenant for life, there would seem to be no doubt that the share of the child so dying would not lapse. The doctrine of lapsed legacies does not apply to the case put. The child, by surviving the testator, would acquire a vested interest. T. P.

TENANT BY CURTESY. P. 192 *antè.*

In the case put by X. it would appear that the estate would descend to the brother's eldest son, as the heir to the infant child. The case is not stated clearly. It is not said whether the will was made before or after marriage; if after, of course it could not pass the estate, as the will of a married woman, except in exercise of a power of appointment, will not pass real estate; if made before marriage, marriage and the birth of a child would be a revocation. The case appears improperly stated, as the brother could not be heir to the deceased, as she left a child. He would, of course, be heir to the child, if he survived it. As the brother only recently died, it is not improbable, if he survived the child and made a will, that the estate passed under his will. T. P.

QUERIES.

COMMON LAW.

POWERS OF COMMISSIONERS OF PAVING.

By the general paving act, 57 G. 3. c. 29. § 54, commissioners of pavement are empowered to pave any street within certain districts, not theretofore paved. In pursuance of which act, certain commissioners, duly appointed and authorized, have thought it expedient to pave a street, the houses on one side of which street are considerably lower than those on the opposite side; and in forming the levels of the street, the foot and carriage pavements has necessarily, as it is contended, been raised several feet above the door sills of houses belonging to *A.*, whereby his tenants are unable to enter without steps inside the doors thereof. Can *A.* maintain an action against the commissioners for the injury thereby occasioned to his property; or compel them to make compensation? the act appears to give no remedy. H. W.

TITHES IN THE CITY OF LONDON.

By 44 G. 3. c. 89. § 11. it is enacted, "that if any inhabitant of the respective parishes named in the act shall neglect or refuse to pay the tithes, as therein appointed, that a distress shall issue, and the amount be raised by sale of the goods and chattels of the party so refusing or neglecting to pay, or the sale of the goods and chattels of the *occupier for the time being* of the tenement, &c. in *respect whereof such arrear shall be due or owing.*" Can an incumbent of any parish enforce payment under this clause by the *present occupier*, for tithes due from his predecessor who became bankrupt, such arrears being due previous to his bankruptcy? or must not the incumbent prove under the commission for such arrears?

As this is an important question, and the incumbent contending that the operation of the bankrupt laws do not affect his right of calling on the present occupier to pay the arrears, I shall be glad of the opinion of your correspondents on the subject. J. G.

MISCELLANEA.

REMNANTS OF CARDINAL WOLSEY'S WEALTH.

The King insisted that the Cardinal should voluntarily relinquish the revenues of the bishoprick of Winchester and of the abbey of St. Alban's to him, together with York-place or Whitehall, and left him in possession only of the archbishoprick of York of all his preferments, a pension of 1,000*l.* per annum issuing out of the bishoprick of Winchester, and the value of 6,395*l.* out of his personal estate, consisting of the following articles; *viz.* 3,000*l.* in money; 9,565½ ounces of plate, at 3*s.* 8*d.* per ounce, amounting to 1,753*l.* 12*s.* 1½*d.*; apparel and household-stuff amounting to 800*l.*; fourscore horses with furniture, valued at 150*l.*; six mules for the saddle with their furniture, at 60*l.*; six mules for his baggage with their furniture, 60*l.*; salt fish to the value of 90*l.*; eight ways of salt, 10*l.*; implements for the kitchen, 80*l.*; seventy sheep, valued at 12*l.*; fifty-two oxen, at 80*l.*; and wearing apparel to the value of 300*l.* But the revenues of the Cardinal's colleges, though actually conveyed to those societies and their successors several years before, were seized to the King's use: for it appears the inquisition his Majesty caused to be taken in most of the counties of England for the discovery of the Cardinal's estate, had a retrospect as far back as the 15th year of the King's reign, when his eminence was charged with having incurred a *præmunire*, and thereby forfeited all his lands and tenements to the crown.—*Abridgment of State Trials.*

The Legal Observer.

VOL. IV. SATURDAY, AUGUST 4, 1832. No. XCIV.

> "Quod magis ad nos
> Pertinet, et nescire malum est, agitamus."
> HORAT.

THE LORD CHANCELLOR AND SIR EDWARD SUGDEN.

We have always abstained from recording, or even noticing, the altercations between the Bench and the Bar. We too well know how easy, in the toil and heat of forensic duty, a hasty expression is used on the one side or the other, and as hastily replied to, and what is called by the newspapers "*a curious scene*," or "*a legal fracas*," takes place. In two minutes the parties recover their temper, and are surprised the next morning to find that the few words thus uttered, already forgotten by themselves, are paraded in the most conspicuous column of the broad sheet. Law and equity interest only the few; but a squabble among the lawyers is, we understand, better than a fire, and nearly as good as a murder. Contenting ourselves, therefore, with the points decided, and the arguments urged for them, we leave these piquant dialogues to our daily contemporaries; but seriously regret that they prefer the passing amusement of the idle and malicious, to the honour and character of our profession. It is with reluctance, however, that we find ourselves obliged to notice the recent dispute between the highest law authority of this country and, perhaps, the most successful advocate of the day; but it has assumed too serious an aspect to be passed over in silence. It involves principles of the utmost importance: it threatens, to a certain extent, to impede the progress of business, and should therefore be placed on its right footing.

It has appeared to us for some time that matters could not go on as they were between the Lord Chancellor and Sir Edward Sugden. There was an evident feeling on both sides, and, as we think, a strong disposition on the part of the latter to provoke a dispute. Certainly, no opportunity has been lost by the member of the House of Commons, to question the conduct of the Peer. The Chancellor, however, with more than his usual command of temper, has, until the late occasion, contented himself with a quiet contradiction of the statements made in the other House. A hasty word has occasionally fallen in Court; but it must have been evident to all how highly inconvenient it would be, if persons necessarily engaged together in almost every cause were on open bad terms. This was the state of things when, by the death of Mr. Scott, the offices, among others, of Registrar of Affidavits and Clerk of the Patents, fell vacant, and after a short lapse of time they were bestowed by the Chancellor on his brother, Mr. James Brougham, which was known by his vacating his seat in the House of Commons. The following notice was taken of it by Sir Edward Sugden:—

Wednesday, 25th July.

He expressed his regret that the Lord Chancellor had filled up the sinecure offices of Registrar of Affidavits and Clerk of the Patents in the Court of Chancery, vacant by the death of the late Mr. Scott, which the public had been given to understand were to be abolished. He also complained that no proposition had been submitted to Parliament for fixing the amount of the Lord Chancellor's salary. He had desired to have proposed the repeal of nine-tenths of the New Bankrupt Act; but he did not wish to moot the question until the salary of the noble and learned Lord was settled. When the noble and learned Lord was out of office, the House was occupied with nothing but discussions respecting the scandalous fees taken by officers of the Court of Chancery;

but the fees continued to be taken, and nothing was said about them, because they found their way into the pockets of gentlemen opposed to those with whom he (Sir Edward) was politically united.

Lord Althorp complained that the honorable and learned gentleman had availed himself of the opportunity of putting a question, to make an attack upon the Lord Chancellor, and said (as was understood) that the offices which had been referred to, were in the gift of the Lord Chancellor, and must be filled up until they were abolished.

Several other members spoke, and it appeared to be their general impression that the appointment was only provisional.

Now, there seems nothing in any part of this speech of Sir Edward Sugden to call forth any very vehement exclamation. It turns out that the appointment *is* only provisional. It seemed merely necessary to state this fact, and the best answer that could be given would have been furnished. The Lord Chancellor, however, the next day, thus replies to it:

He said he owed it to himself to take the earliest opportunity to offer a few words in reply to some observations that were reported to have been made in reference to the appointment to certain offices in his official patronage. He would take it for granted that the learned gentleman who figured on the occasion was only anxious to obtain authentic information on a point in which he had, he must observe, some forty-eight hours' notice before he sought it, and on which, had he condescended to ask him (the Lord Chancellor) a single question, he would have been promptly and satisfactorily answered. His Lordship then proceeded at considerable length to observe on the objectionable mode of remunerating the Chancellor, by patronage and fees as well as salary—a mode which he was determined to use every means in his power to abolish. But it surely (he said) did not follow that, because he had pledged himself to the abolition of those sinecures, that he should, when the appointments thus unexpectedly fell into his hands, refrain from taking possession of some of the emoluments of his office before any regulation had been adopted for placing them on a better footing. The proposition was absurd, and surely never entered into the head of any man possessing brains; so that he was convinced that the question put by a learned gentleman in another place, which seemed to insinuate that he was violating his pledge by filling up the appointment, had no such meaning, and wholly originated from a laudable anxiety to "elicit information on a matter affecting the character of the highest law authority." "Yes," continued the learned Lord, "I am bound to believe—nay, cannot for a moment doubt, that the learned gentleman was wholly influenced by this most praiseworthy desire of information. How could I think otherwise,—knowing as I do, in common with that eminent 'high law authority,' that philosophers have long since eulogized this laudable thirst of knowledge as the most distinguished attribute of humanity, and as the most distinguished feature of an ingenuous and lofty intellect?"

So far—however ironical this may be—there is nothing but what might have been borne. Then comes the passage at which such just exception has been taken; but which we do not insert, as we are unwilling to give further currency to it.

"Yes, I say, it is this laudable propensity upon which humanity justly prides itself, which I have no doubt solely influenced the learned gentleman to whom I allude, to seek for information, which it would be cruel to stingily gratify." Convinced that this was the sole source of the learned gentleman's question and remark, he only regretted he did not apply to him sooner for an answer. Fortunately, so far as the cavil of little minds was concerned, he had living witnesses in that House and elsewhere, to testify that before the melancholy occasion of the vacancy, and forty-eight hours after it had occurred, he had expressed his firm determination to go on with the self-same sinecure-abolishing Bill, precisely as if these vacancies were not likely to occur, or never had occurred.

It is useless to deny the accuracy of the report in the Times. It is impossible that the expressions could have been invented or interpolated by the reporter. We deeply regret that they were uttered, for the sake of the noble Lord, and the dignity and character of his office. Has Lord Brougham been the first Chancellor who has been attacked? He should have been the last person to forget that the man who has attained his office has ever been exposed to the bitterest and most vehement political animosity. Had he chosen to reply, it should have been in terms at least warranted by parliamentary usage, which, it might have been thought, would have supplied him with weapons sufficiently pointed. He should have remembered the lofty rebuke which Lord Thurlow gave to his opponents:—he should have remembered the dignified patience of Lord Eldon, under ten thousand times tenfold of all that Lord Brougham has suffered from Sir Edward Sugden;—he should have remembered the temperate and manly reply of Lord Lyndhurst to Sir Charles Wetherell; and if he had forgotten all these examples, he should have remembered his own high character, and what was due to himself and to the office which he holds. His Lordship has now clearly given his adversary the advantage, and we sincerely hope that he will find some opportunity of setting himself right with the profession and the public on the subject.

PUNISHMENT OF DEATH ACT.

This act, 2 & 3 W. 4. c. 62, which was introduced by Mr. Ewart, contains some of the most important alterations effected in the law during the present session. It contains only two sections, which are in substance as follow:

Reciting the 7 & 8 G. 4. c. 29, by which it is enacted, that if any person shall steal in any dwelling house, any chattel, money, or valuable security, to the value in the whole of five pounds or more, every such offender shall suffer death as a felon; and that if any person shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, or shall wilfully kill any of such cattle with intent to steal the carcass or skin or any part of the cattle so killed, every such offender shall be guilty of felony, and shall suffer death as a felon: And reciting 9 G. 4. c. 55, by which it is enacted, that if any person shall steal in any dwelling house any chattel, money, or valuable security, to the value in the whole of *five pounds or more*, every such offender, being convicted thereof, shall suffer death as a felon; and that if any person shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, steer, bullock, heifer, or calf, or any ram, ewe, sheep, or lamb, or shall wilfully kill any of such cattle with intent to steal the carcass or skin or any part of the cattle so killed, every such offender shall be guilty of felony, and shall suffer death as a felon: And reciting, it is expedient that a lesser punishment than that of death should be provided for the several offences hereinbefore specified: It is therefore enacted, That so much of each of the said acts as inflicts the punishment of death upon persons convicted of any of the felonies before specified shall be repealed; and that from and after the passing of this act every person convicted of any of the felonies before specified, or of counselling, aiding, or abetting the commission thereof, shall be transported beyond the seas for life.

II. That neither the Governor or Lieutenant Governor of any island, colony, or settlement, or any other person, shall give any pardon, or ticket of leave to any person sentenced to transportation, or who shall receive a pardon on condition of transportation, or any order or permission to suspend or remit the labour of any such person, except in cases of illness, until such person, if transported for seven years, shall have served four; if transported for fourteen years, shall have served six; or if transported for life, shall have served eight years of labour; and that no such person shall be capable of acquiring or holding any property, or of bringing any action for the recovery of any property, until after such person shall have duly obtained a pardon from the Governor or Lieutenant Governor of the colony or settlement in which he or she shall have been confined: *Provided that nothing herein contained shall in any manner affect his Majesty's royal prerogative of mercy.*

It will be observed, that the first section, attaching the punishment of transportation for life to the commission of any of the offences enumerated in it, leaves no discretion to the Judge, in passing sentence on convicted offenders. It has thence been thought, by a considerable portion of the public, that the punishment of transportation for life must in all cases be inflicted. But it is clear, that no such necessity exists. It will still be in the power of the Judge to recommend a mitigation of punishment by the Crown, and no doubt such a recommendation will operate effectually. Previous to the present statute, when sentence of death was passed or recorded for the above mentioned offences, the Judge was obliged to pass or record the sentence, but it was still in his power to recommend to mercy, and the recommendation so made was always effectual in obtaining a mitigation of punishment.

The enactments contained in § 2, it will also be observed, only restrain the individual discretion of Governors and Lieutenant Governors. Their recommendation to the Crown may still be made for the mitigation of sentence; and no doubt can be conceived, that on a proper representation, the Crown would yield to the recommendation.

The only real change effected in the law by this act, undoubtedly a very important one, is the abolition of the punishment of death, in the instances enumerated in the act.

REVIEW.

The Law and Practice of Elections (for England and Wales), as altered by the Reform Act, &c. including the Practice on Election Petitions: with a copious Appendix, containing all the Acts on Elections; with the Reform, and the Division of Counties and Boundary or Borough Acts; New Forms to be used in Elections; Lists of Boroughs, &c. &c. By Charles F. F. Wordsworth, Esq., of the Inner Temple. Saunders and Benning.

A Classified Analysis of the several Sections of the Reform Act 2 W. 4, c. 45, which constitute its leading Principles, and of those which relate to Registration and taking the Polls at Elections; with Notes, explaining what must be done by Electors

before they can exercise their Franchises: and Tables, showing the Population and Number of £10 Houses in the new Boroughs; and the Population of the Counties to which additional Members are given: the Schedules complete: the Order in Council relative to the First Registration: and an Abridgment of the whole Act. By James Whishaw, Esq., Barrister at Law; Author of "A New Law Dictionary." Stevens and Sons.

The Acts 2 *W.* 4, *c.* 45, *to amend the Representation of the People, and* 2 *W.* 4, *c.* 64, *to settle and describe the Division of Counties, and Boundaries of Cities and Boroughs in England and Wales, and other recent Statutes: to which is prefixed, an Analysis, containing the Law and Practice of Elections, as now altered, with Tables, and a copious Index, adapted to the use of Overseers and Parish Officers.* By William Finnelly, Esq., of the Middle Temple, Barrister at Law. Maxwell.

We are induced, from the importance of the new Law and Practice of Elections under the Reform and Boundary Acts, to notice this additional batch of Treatises. We cannot undertake the task of comparing minutely each with the other, and awarding their several proportions of merit, but shall, so far as practicable within our limits, enable our readers to form their own judgment. No doubt that every book compiled with diligence on this interesting subject, must be more or less useful at the present period, when preparations for the election are about to commence under the new order of things. Each of these works, therefore, is entitled to attention.

Mr. Wordsworth's book, which, compared with the size of the others, is a somewhat imposing volume, is announced as having been in preparation before the acts were passed, and professes to give the *whole* law and practice of elections; and the author thinks that in this respect he has the advantage over those who have merely laid the two acts before the public, with explanatory notes. Now it seems to us obvious, that nothing more at present could be usefully done than has been effected by the other writers at the head of this article, and by those whom we noticed in a recent number (p. 179 *ante*). The acts "with explanatory notes," are all that can safely be brought forward. Until they have come into operation and their details have been tried, nothing of their construction can be considered as settled. There is nothing of that large mass of English jurisprudence which the late Mr. Bentham described as "Judge-law." We do not perceive, therefore, that much can be gained by the profession from a work aiming to do what there are not yet materials accurately to construct. However Mr. Wordsworth has broken the ground, and in a future edition may complete his task. The other parts of the plan of his book are not peculiar to himself. They are aimed at by all the other writers. Each of them seeks to assist overseers and others in the discharge of their duties. Mr. Wordsworth observes, however, that his book will also be useful to *solicitors*, "who will be constantly called upon to give advice to overseers during the formation of the lists of voters, and who will necessarily be employed—*counsel being prohibited from attending*—in arguing votes before the revising barristers." This point has also been observed upon by Mr. Finnelly. On turning to the act we see that by section 52, "at the holding of such courts the parties shall not be attended by counsel;" but it will not follow that solicitors have *a right* to attend, though we presume they will not be excluded.

Mr. Wordsworth's book also contains the Acts relating to Elections in operation *notwithstanding the Reform Act*; and though these occupy 102 pages of his Appendix, they seem to be a very useful addition, in the view of forming a complete work. An abstract of the Order in Council of the 11th July is prefixed, which it may be useful to extract:—

For Counties:

The overseer's notice to persons to send in claims must be given by the 25th July.

Persons claiming to vote must send in their claims to the overseers by the 20th Aug.

The overseers are to prepare lists of voters, &c., by the 31st August.

Persons objecting to the claims of others must send in their notices of objections by the 25th September.

The lists of persons objected to must be affixed to the doors of churches, &c., on the two Sundays next preceding the 15th October.

Such lists may be perused within the ten days next preceding the 14th October.

The list of voters, and statement of persons objected to, must be delivered by the overseers to the high constable by the 29th September.

The barristers must hold their courts between 15th October and 25th November.

Cities and Boroughs:

The overseers to prepare lists of persons

entitled to vote by virtue of the Reform Act by the 31st August.

The town clerks to prepare lists of freemen entitled to vote by the 31st August.

Persons omitted from the lists and claiming to vote, and persons objecting to others, whose names have been inserted in the lists, must give their notices accordingly by the 25th September.

The overseers are to affix lists of persons so omitted and claiming, and of persons objected to, on the doors of churches, &c. on the two Sundays next preceding the 15th October.

The town clerks are to affix lists of persons so omitted and claiming (freemen), and of persons objected to (freemen), on the doors, &c., of the town hall, &c., on the two Sundays next preceding the 15th October.

Such lists—overseers' and town clerks'—may be perused within the ten days next preceding the 15th October.

The barristers must hold their courts between 15th October and 25th November.

London:

The returning officers are to issue their precepts to the clerks of the livery companies, directing them to make out lists of freemen and liverymen, by the 31st August.

Persons omitted from such lists and claiming to vote, and persons objecting to others whose names have been inserted, must give their notices accordingly by the 25th September.

The returning officers are to affix the list of persons omitted from, and claiming to be inserted in, the list of freemen and liverymen, in the Guildhall and Royal Exchange, on the two Mondays next preceding the 15th October.

Such lists may be perused within the ten days next preceding the 15th October.

Counties, Divisions, &c.—Cities, Towns, and Boroughs—and London.

Overseers may inspect and make extracts from tax assessments between 12th July and 31st August.

The barristers cannot hold any adjourned court after the 25th November.

The clerk of the peace is to copy lists of voters into a book, which is to be the register, by the 1st December.

The returning officer is to copy lists of voters into a book, which is to be the register, by the 1st December.

The books, mentioned in the two last paragraphs to be so completed by the 1st December, are to be in force, as the registers of electors, from that day to the 1st November, 1833.

The object of Mr. Whishaw's book is explained in the title-page; and he has (according to his preface) endeavoured to free the sections composing the Analysis and illustrating the essential objects of the act, from that tautology which legal accuracy is thought to require, but which, not unfrequently, renders the meaning obscure to all but professional men. The Analysis and Abridgment form a complete digest of the act, and the Notes are designed to assist the reader both to obtain a correct knowledge of its most prominent details, and to apply that knowledge to practice when occasion may require. After giving an abridgment of the act, Mr. Whishaw has arranged it in his Analysis under the heads—1st, of Disfranchisement; 2d, Enfranchisement; 3d, Extension of the Suffrage; 4th, Registration; 5th, Polling in Districts and Duration of Elections. Mr. Whishaw's book contains the whole of the Order in Council—an abstract of which we have given from Mr. Wordsworth. From the population returns for 1831, and the returns relating to parliamentary representation, Mr. Whishaw has thrown into a tabular form the twenty-two newly enfranchised boroughs, with a statement of the amount of population and number of 10*l.* Houses.

Boroughs.	Population in 1831.	Houses of the value of 10*l.* and upwards.
Manchester . . .	187,022	12,723
Birmingham . . .	142,201	7,000
Leeds	123,393	6,833
Greenwich . . .	63,172	6,000
Sheffield	90,657	4,383
Sunderland . . .	40,735	2,528
Devonport . . .	44,000	3,000
Wolverhampton . .	67,000	2,400
Tower Hamlets . .	302,519	23,187
Finsbury	224,339	23,266
Mary-le-bone . .	234,294	21,630
Lambeth	154,613	16,405
Bolton	42,395	1,612
Bradford	34,688	1,624
Blackburn . . .	27,091	625
Brighton	41,994	
Halifax	31,317	1,330
Macclesfield . . .	30,000	1,100
Oldham	32,381	1,128
Stockport	41,000	1,500
Stoke-upon-Trent .	53,000	1,500
Stroud	41,000	1,600

The scope of Mr. Finnelly's work, which has come last to our notice, is to state clearly and precisely the effect of every section and schedule in the acts, and to introduce into a systematic arrangement of them as much of the pre-existing law of elections as appeared necessary to render the volume a safe directory. He has also prefixed tables of the manifold qualifications which entitle persons to be registered as electors, which he hopes will help "to ascertain the

slender differences that will sometimes separate just rights from bold pretensions to share in the elective franchise."

This part of Mr. Finnelly's Analysis will be found so generally useful—presenting a complete view both of persons who are excluded, and those who are entitled to be registered—that we shall venture to extract a considerable part of it, omitting the accompanying remarks.

I. PERSONS EXCLUDED FROM THE ELECTIVE FRANCHISE, AND NOT TO BE REGISTERED.

Aliens, idiots, lunatics, minors, and females.

British peers, ministers of state, lords lieutenants, and governors of counties.

Persons convicted of perjury and bribery, or subornation of perjury.

Felons convict under sentence of punishment.

Persons excommunicated in the Ecclesiastical Courts.

Outlaws in criminal proceedings.

Persons holding no religious belief.

Bankrupts and insolvents, in certain circumstances.

Receivers of alms, within a year, in cities and boroughs.

Persons who receive parochial relief, ditto, ditto.

Commissioners, collectors, supervisors, gaugers, or other officers employed in collecting the excise duties.

Commissioners, collectors, comptrollers, searchers, or other officers employd in collecting the customs duties.

Commissioners, officers, distributors, or other persons employed in collecting the stamp duties.

Commissioners, officers, or other persons employed in collecting the duties on salt.

Surveyors, collectors, comptrollers, inspectors, or other persons employed in collecting the window and house duties.

Postmaster-general, postmasters or deputies, or other persons employed in collecting the post-office revenue.

Captains, masters, or mates, of ships or packets employed by the postmaster in conveying the mails.

Justices, receivers, and all other persons belonging to the London police, are excluded from the franchise in the counties of Middlesex, Surrey, Hertford, Essex, and Kent, and from Westminster, Southwark, and the new boroughs in the Metropolitan districts.

Counsel and all agents of candidates at elections, for fee or reward, are excluded from voting at the same, but not from being registered.

Mortgagees and trustees, not in possession of the estate, or in receipt of the rents and profits.

Mr. Finnelly then observes, that all these, and such others as were excluded by the former laws, are excluded under the new act, the 75th section of which declares all former election laws to be in full force, and applicable to all cases, except where they are repealed, altered, or superseded by that act.

He then proceeds to state—

II. THE PERSONS ENTITLED TO BE REGISTERED AS VOTERS IN COUNTY ELECTIONS.

Freeholders.—1. Seised of freeholds of inheritance of the yearly value of 40*s.* above rents and charges—occupied by them or not.

2. Seised of freeholds for life or lives, of the yearly value of 10*l.* above rents and charges—occupied by them or not.

3. Seised of freeholds for life or lives, of the yearly value of 40*s.* above rents and charges—occupied by them.

4. Seised of like freeholds of like value, and which, though not occupied, would have given them rights of voting on the 7th of June, 1832.

5. Seised of like freeholds of like value, acquired after that day by marriage, marriage settlement, devise, promotion to a benefice or office.

In one or other of the four last classes are included the following:—

Freeholders in right of marriage, as tenants by the curtesy, tenants in tail after possibility of issue extinct, husbands of coparceners and of women entitled to dower.

Freeholders, in right of ecclesiastical benefices, being sole corporators, as deans, archdeacons, prebendaries, parsons, and vicars.

Freeholders by office, as dissenting ministers, schoolmasters, parish clerks, sextons, and other officers appointed generally or for life, or during their good behaviour, and whose emoluments arise out of lands annexed to their offices.

These different estates of freehold may be acquired not only in lands, benefices, and offices, but also in tithes, fee-farm rents, rent charges, annuities charged upon land, and land-tax purchased; in tolls of fairs and markets, and in shares in navigable rivers, canals, and bridges.

Joint tenants or tenants in common, of any of the above freehold estates, are severally entitled to be registered, and to vote separately.

Copyholders.—1. In right of copyholds of inheritance, or for life or lives, of the yearly value of 10*l.* above rents and charges.

2. Under the head of copyholders may be named customary freeholders, or tenants by copy of court roll, by the verge or tenant right, tenants in ancient demesne, charter tenants, &c.

3. Equitable copyholds, as heirs, devisees, &c., according to the custom of the manor, before admission.

Leaseholders.—1. The original lessee of lands or tenements of the yearly value of 10*l.* above rents and charges, for any term not less, when created, than sixty years, whether in his occupation or not.

2. The original lessee of lands or tenements of the yearly value of 50*l.* above rents and charges, for any term not less, when created,

than twenty years, whether in his occupation or not.

3. The assignee of any unexpired residue of either of those terms, whether in his occupation or not.

Occupiers.—4. The sub-lessee or assignee of an under-lease of any unexpired residue of either of those terms in his own occupation.

5. Persons occupying as tenants any lands or tenements liable to the yearly rent of 50*l.* or more.

Equitable owners.—Equitable owners—as mortgagors and mortgagees, vendors and vendees, *cestui que trust*, and trustees in possession of any of the above qualifying estates, subject to the restrictions applicable to the same.

III. Voters in Cities and Boroughs.

Occupiers.—1st, As owners or tenants of any house, warehouse, counting-house, shop, or other building, within the new boundaries of the city or borough, or place sharing with it in the election, of the clear yearly value of 10*l.*

2d, Occupiers of any house, warehouse, &c. which, together with land, also in their occupation, as owners, or if as tenants, then under the same landlord of whom the house is held, of the yearly value of 10*l.*

3d, Occupiers of such premises in immediate succession within the year.

4th, Joint occupiers as owners or tenants of the like premises being of such clear yearly value as shall when divided give 10*l.* for each occupier; if of less value, none of them are to be registered.

Inhabitants.—1, As inhabitants paying scot and lot.

2, Inhabitants householders, and potwallers legally settled.

3, Inhabitants householders, and potwallers.

4, Inhabitants generally, resident within the city or borough.

Freemen.—Freemen or burgesses, or freemen being liverymen of the city of London, having a right to vote at the passing of the new act. In order to be registered they must be qualified to vote on the last day of July in the year of registration, as fully as if that were the day of election and this act had not been passed; the residence required is the same as of the last class.

Burgesses or freemen made or admitted since the 1st March, 1831, or even after in any other right than by birth or servitude or in respect of birth, unless the right be derived from one who was or was entitled to be a freeman before that day, or from one who since that day has or hereafter shall become a freeman by servitude, are not entitled to be registered: to be like voters in cities and boroughs.

Burgage tenants, and freeholders.—In right of burgage tenements or freeholds acquired before the 2d day of March, 1831, or coming after that day and before the 8th of June, 1832, by descent, succession, marriage, marriage settlement, devise, promotion to a *benefice or office.*

Freeholders.—This franchise cannot be now acquired in cities and boroughs which are not counties of themselves: all that has been said of the class of "inhabitants, &c." in respect to the requisites for registration, applies to these.

IV. Voters in Cities and Towns, Counties of themselves.

1. *Freeholders.*—The five classes described in the table of county voters, with the like limitations of annual value and like restrictions and exceptions as to actual possession and time of possession.

2. *Freeholders and burgage tenants.*—In right of burgage tenements or freeholds, with or without any superadded qualifications, within the new boundaries of these corporate counties: of these is required, in order to be registered, possession or receipt of the rents and profits for twelve calendar months, unless the qualification came by descent, succession, marriage, marriage settlement, devise, or promotion to a benefice or office; and residence for six calendar months next previous to the last day of July in the year of registration within such city or borough or seven statute miles thereof.

This class differs in no respect from those described under the same head in other cities and boroughs, except that in the latter they are not to be continued, but they are to be permanent voters in these corporate counties.

Occupiers.—All the classes of occupiers that have been described in the table of voters for other cities and towns, subject to the like limitations and restrictions as to annual value, occupation, and residence.

Inhabitants.—All those that are described as inhabitants in the second table of voters for other cities and boroughs, subject to the like restrictions and conditions.

Freemen.—Under the several restrictions and conditions as in other cities and boroughs.

In consequence of the extension of the time of holding the Barristers' Courts, from the 25th October to the 25th November, we understand that many barristers of considerable practice, who were willing or desirous to accept the office, have declined to sacrifice the advantage of attending (which they would now necessarily do) the October Sessions and the whole of Michaelmas Term. The business must, therefore, fall into the hands of those who have comparatively less to lose by undertaking the duty.

Having, in our own pages, given an Analysis of the Act, we do not consider it necessary to make any further extracts from the authors before us. Our readers are now in possession of all the material or important parts of the change in the law effected by this statute.

LONDON UNIVERSITY—ENGLISH LAW CLASS.

We insert the substance of the Professor's Report of the Class of English Law, for the session 1831-2.

The entries of the class of English law during the present session, have amounted to a hundred, making, since the opening of the University, between four and five hundred law students.

In the course of legal education pursued in this University, much practical information, and of a different description from that hitherto taught, is offered. It holds out a more scientific knowledge of legal principles than is acquired in offices; and the Professor invites students to test the extent and value of their own knowledge, by means of public conversations, examinations in writing, forensic arguments, and essays upon law and jurisprudence.

There is no doubt that legal education would be further improved, if it were to embrace Universal and National and Medical Jurisprudence; together with the study of Constitutional Law, including English History. But, in the present state of the legal profession, the professor conceives that it is almost impossible to collect, or at least to uphold, a class, who will attend a course of lectures upon any of these subjects; and he observes, that no students but such as are particularly anxious for self-improvement, will, under the existing circumstances of the profession, make the effort of coming to a lecture room for any kind of legal instruction. And such is the force of ancient custom, that it is by no means an easy exploit to attract even ambitious students to this place.

The results of the present year, as far as they relate to the *progress of the students*, are described by the Professor as of the most splendid character. In addition to the three examination prizes instituted by the University, the Professor has seen fit occasion for bestowing eleven additional prizes in the course of the year; seven for Examinations, and four for Essays. The present is the second year of the introduction of prize essays. The successful Essays will, in all probability, shortly be published; and I can assure the council, that they will confer honour upon this University, and be highly esteemed by the legal profession.

At Christmas, examination prizes were delivered to Mr. *Heath*, Mr. *Eadon*, Mr. *Harden* (*Æquales*), Mr. *Hubback*, and Mr. *Wadsworth*.

At Easter, examination prizes were delivered to Mr. *Hubback*, and Mr. *Heath*.

The prizes to be distributed at the close of the session were, first, the three University examination prizes to Mr. *Harden*, Mr. *Heath*, and Mr. *Hubback*, (*Æquales*).

And, next, four essay prizes. The November prize, subscribed for by the class, "On the Illustrations which the History, Opinions, and Manners of the Country, derive from the Statutes of the Realm," to Mr. *Hare*, a gentleman who distinguished himself in every examination of last year. The Christmas prize, on pedigree, to Mr. *Hubback*. Two Easter prizes, on Life Insurances, to Mr. *Gale* and Mr. *Heath*.

In the next year, the same system of legal instruction is intended to be pursued in this University; excepting that shorter courses will be introduced; and that, in some of the courses, a later hour will be fixed upon, to suit the convenience of gentlemen attending offices.

PROPOSED ALTERATIONS IN CHANCERY COSTS.

(*Concluded from p.* 199.)

Hilary Term.	Present Charge. £ s. d.		Proposed Charge. £ s. d.
Paid more for order	0 3 0	There appears no objection to these	0 3 0
Attending registrar settling and passing same	0 6 8		0 6 8
Paid entering	0 1 6		0 1 6
Drawing and ingrossing petition to set down cause on further directions and costs	0 4 0	This petition and order is unnecessary; the cause should be set down on application by the solicitor, and on payment of a small fee, say	0 5 0
Paid answering petition	0 12 6		
Attending to present, and for same	0 6 8		
Paid for order, entry, and setting down cause	0 10 6		
Three fair copies and service	0 10 6		
Fair copy decree for his Honor, 27 sides	0 13 6	There is no objection to these	0 13 6
The like, general report, 62 sides	1 11 0		1 11 0
The like, testator's will, fo. 11	0 4 8		0 4 8
Attending to leave same with his Honor's secretary	0 6 8		0 6 8

	Present Charge. £ s. d.		Proposed Charge. £ s. d.
Paid thereon	0 5 0	This fee should be abolished, the proposed fee on setting down the cause being sufficient.	
Term fee, &c.	1 1 8	*Anté*	0 15 0
Easter Term.			
Drawing brief for hearing on further directions, 8½ br. sh.	2 16 8	There is no objection to these	2 16 8
Two fair copies for counsel	2 16 8		2 16 8
Term fee, &c. cause in register book	1 1 8	*Anté*	0 15 0
Trinity Term.			
Fee to Mr. —— with brief, and clerk	5 7 6	There is no objection to these, except the clerks' fees	5 5 0
Attending him	0 6 8		0 6 8
Fee to Mr. —— with brief, and clerk	3 5 6		3 3 0
Attending him	0 6 8		0 6 8
July 11—Attending court, cause in the paper	0 10 0		0 10 0
12—The like, decree made	0 13 4		0 13 4
Paid Court fees	0 13 0	This should be reduced, say to	0 5 0
Paid for copy minutes of decree	0 11 0	And this to	0 5 6
Clean copy	0 5 6	There is no objection to this in country causes, when actually made	0 5 6
Attending settling	0 13 4	There is no objection to this	0 13 4
Term fee	1 1 8	*Anté*	0 15 0
Michaelmas Term.			
Paid for decree	5 15 6	This might be reduced by shortening the recitals and lessening the scale of charge, to at least	2 0 0
Attending, examining and passing	0 13 4	There is no objection to this	0 13 4
Paid entering	0 17 6	This would necessarily be less, if the decree were shorter—say	0 9 0
Attending to enter and examine same	0 6 8	There is no objection to these	0 6 8
Copy title and mandatory part of decree for the master	0 5 0		0 5 0
Term fee, &c.	1 1 8	*Anté*	0 15 0
Easter Term.			
Paid for copy charge of subsequent interest on legs., fo. 21.	0 10 6	This should be reduced to	0 7 0
Attending warrant thereon	0 6 8	There is no objection to this	0 6 8
Drawing this bill of costs, fo. 100, and fair copy for the master	3 6 8	There is no sound objection to this. The popular objection that a solicitor is paid for the making out of his bill, is founded in error, as this is really not his bill (the client generally, when costs are taxed as between solicitor and client, requiring a copy; and of necessity he must have one when the bill is taxed as between party and party, on account of the extra costs; in neither of which cases is the copy charged for) but a proceeding in the cause solely for the benefit of the suitor, saving him the expense of a trial at law, to which the debtors to all other professors and traders are subject, in order to reduce an unjust demand	3 6 8

	Present Charge. £ s. d.		Proposed Charge. £ s. d.
Warrant on leaving three copies and service	0 6 6	This might be saved, as before observed, by making the first warrant to tax returnable in four days.	
Five warrants to tax	1 13 0	There is no objection to these	1 13 0
Attending same	1 13 4		1 13 4
Paid clerk in court	1 13 4	This can only be got rid of by annihilating that useless office, the Six Clerks'. The attendance of the clerk in court is unnecessary, as the master should tax the bill.	
Paid for copy defendant's costs, fo. 120	3 0 0	This should be reduced to	2 0 0
Attending five warrants to tax	1 13 4	There is no objection to this	1 13 4
Paid clerk in court	1 13 4	See observation, *antè*.	
Term fee, &c.	1 1 8	*Antè*	0 15 0
Trinity Term.			
Paid for copy draft report, fo. 96	2 8 0	This should be reduced to	1 12 0
Close copy	1 12 0	This should only be allowed in country causes	1 12 0
Warrant on preparing report, three copies and services	0 6 6	This is an unnecessary warrant.	
Three warrants to settle	0 19 6	There is no objection to these	0 19 6
Attending same	1 0 0		1 0 0
Warrant to sign report	0 6 6		0 6 6
Attending same	0 6 8		0 6 8
Paid for report, transcribing, &c.	4 10 6	This should be reduced to about	2 0 0
Master's clerk	3 3 0	This should be allowed, for the reasons before stated	3 3 0
Paid filing and for office copy	2 16 0	This should be reduced to	1 12 0
Attending to file, and for office copy	0 6 8		0 6 8
Writing to plaintiff to remit balance	0 3 6		0 3 6
Attending Accountant-general for direction to pay in	0 6 8		0 6 8
Attending to pay in money	0 6 8		0 6 8
Paid filing cashier's receipt, and for office copy	0 6 0		0 6 0
Attending registrar for certificate to sell	0 6 8	There is no objection to these	0 6 8
Attending the Accountant-General therewith, and instructing him	0 6 8		0 6 8
Paid thereon	0 7 0		0 7 0
Paid carrying over balance	0 7 0		0 7 0
Attending the Accountant-General thereon	0 6 8		0 6 8
Paid entering cheque for costs	0 2 6		0 2 6
Term fee, &c.	1 1 8	*Antè*	0 15 0
	Present charge £ 264 17 8		Proposed charge £ 195 2 0

DISPUTED DECISIONS.
No. X.

NUISANCE.

I cannot think the decision of the Court of King's Bench in the case of *Rex* v. *Moore*, (*ante*, 122-3) will be generally acquiesced in by the profession. You, Mr. Editor, epitomise it in these words, "Making use of an enclosed ground for the purpose of pigeon-shooting, whereby persons assemble on the outside of the ground for the purpose of shooting the pigeons which escape, and in so doing commit trespasses on the adjoining lands, is an indictable offence."

What was the principle upon which the defendant was convicted? It appears that he used his own ground, which was "properly enclosed and secured," and it was admitted by Mr. Justice *Littledale*, that it was *not* the object of the defendant to bring together those idle people who assembled on the outside of the ground; but his lordship adds, "it is the

natural consequence arising from the pigeon-shooting which takes place on his ground." Now, whether or not the consequence was *natural*, I take to be the gist of the case.

It was proved, that so far from encouraging the "idle people" to assemble, the defendant himself was annoyed—nay injured—by their presence; for those pigeons which chanced to fly out of the inclosed ground, might have returned had they not been shot by the "idle people." Surely it cannot be doubted, that the inducement for their assembling was the opportunity they had of dishonestly and illegally appropriating the defendant's pigeons which escaped his gun. On his lordship's principle, it must be supposed, that if the defendant and his friends had *not shot* at the pigeons which were thrown up on his ground, but merely let them off, (*e. g.* from a dovecot) every day, it would have been the "natural consequence" that persons should trespass on the adjoining ground and shoot them! Is it not quite as likely that the idle persons would be attracted by *such* an opportunity? Did it matter to them whether the pigeons which flew in their way had been previously shot at, or not? Certainly not, for nobody can doubt, that it was the pigeons, and not the shooting at them by the defendant, which brought the crowd together. The defendant then naturally and properly did all he could to keep off the "idle people;" he even employed a constable for the purpose.

Had the persons trespassing been the defendant's friends, who came to shoot the pigeons, then indeed he might have been held guilty of a nuisance, as the "natural consequence" of his own act;—that the pigeons were the object which attracted the "idle people," and not the shooting. Suppose the defendant had turned off a quantity of sparrows, or other worthless birds, can it be supposed the "idle people" would have assembled? And would he be responsible for their acts if they had assembled? And yet, on principle, ought not the law to be the same in both cases? If he might with impunity turn up and shoot sparrows, why might he not pigeons? Is the principle of law regulated any more by the description or value of the bird shot at, than it would be by its colour or size?

A natural consequence of an act is that which every man must reasonably expect to follow. But why should the defendant expect, not merely that the "idle people" would be attracted, but that, despite of his strenuous efforts to prevent them, they would assemble, come armed with guns, and commit a trespass?

According to your report of the case, the learned Judges were very laconic in delivering their opinions. The Chief Justice merely says, "the defendant wishes to enjoy his own ground to the injury of his neighbours, and that if a man attract a crowd of people, to the annoyance of the public, *no matter for what reason*, no doubt he is responsible." But do not the facts prove that such was *not* the defendant's wish? Did he not do all he could to prevent annoyance? And must *he* not be said to have attracted the crowd, much in the same sense that a man's wealth attracts a thief? Surely we must regard the *sufficiency* of the reason or cause of the "idle people" assembling; otherwise there would be no consistent principle on which to decide such questions; and, in my humble judgment, Mr. Joy correctly contended against the conviction, on the ground, that the annoyance was not the "natural consequence" of the defendant's acts; and a better illustration could not have been given, than that of the pastry-cook girl, whose beauty attracted a crowd of persons round her father's shop.

Surely the instances mentioned by Mr. Justice *Taunton*,—that common stages for rope dancing, and playhouses, are indictable, for drawing together disorderly persons, are not analogous to the present case; because, in those cases, the drawing together a crowd *is obviously* the natural and intended effect of such exhibitions.

In conclusion, I submit that the defendant was no more responsible for the acts of the persons who assembled around his enclosed ground (not invited by him, but against his wish) and trespassed on the adjoining ground, than a man would be who should take his friends into his preserves to shoot game or pigeons; if, in consequence, persons were attracted outside, and "trespassing on the adjoining grounds," shot the game or pigeons which escaped; and, for the same reason, their so assembling and trespassing would not be the natural consequence of the shooting in the preserves, but an illegal act of the parties themselves, and who only, therefore, would be responsible.

T. P.

IMPRISONMENT FOR DEBT.

PROPOSED MODIFICATIONS.

In the Monthly Record for July we have inserted the principal part of the Supplemental Paper to the Fourth Report of the Common Law Commissioners, containing the able statement and arguments of Mr. Serjeant Stephen against the abolition of imprisonment for debt. Referring to that part of the work for the full details of the subject, we may here notice some regulations which the learned commissioner thinks will effectually check the few cases of abuse which now occur under the law of arrest.

"It seems improper to allow an arrest to take place upon the affidavit of a person resident *abroad*; because, in the case of perjury or mistake, his absence from the realm might protect him from penal consequences. It would apparently therefore be reasonable to provide that the affidavit to authorize an arrest should always be sworn within the United Kingdom, and should contain an allegation that the deponent is a British subject ordinarily resident in this country.

"It would be desirable too, that in a case of

manifest perjury (as where there have been no dealings at all between the plaintiff and defendant, and they are strangers to each other), the law should expressly allow to the court or a single judge the power of discharging the defendant upon a summary application. If the judges were to interfere in ordinary cases, it would involve the necessity of trying the cause, in every instance, upon affidavits, and would entirely destroy the efficacy of the practice of arrest; but in the qualified sense above suggested, their interference would be quite unobjectionable, and would afford a speedy relief to all persons arrested under circumstances of flagrant oppression. It is believed that to this extent the relief can even now be obtained; but the practice relating to this subject ought to be placed on a more distinct foundation."

The Serjeant is also disposed to admit that the practice of *bail below* is objectionable. He considers, however, that

"It is possible, to get rid of the *bail below* altogether, without prejudice to that principle or to any other valuable object. The means were long ago pointed out by a gentleman of great experience in the practice of the sheriff's office, and were communicated to the public in the First Report of the Common Law Commissioners. That gentleman suggested, that instead of arresting the defendant in the first instance, notice should be given him, that unless the debt be paid, he must either put in bail to the action, or render himself to prison within a certain short period to be specified; and that in the event of his failure to comply with either alternative, he should be considered as a criminal, made liable to an escape warrant, and, when taken, committed to close custody, without being allowed the benefit of bail. He was apparently not aware, that this very course of practice has, in substance, long existed in *Scotland*, and that it is the mode of proceeding there in every case of "diligence" against the person. There seems no reason to doubt that it might be beneficially adopted in this country also, in lieu of the present system of immediate arrest. It has been supposed, that it would operate as a mere notice to abscond; but it is at all events not more liable to this objection than serviceable process, which those who recommend the abolition of arrest propose to substitute for it universally. There are besides good reasons, in the nature of the case, for thinking that not much inconvenience of that kind would arise. It is, in general, very unlikely that a man should abscond at a short notice; it requires some time for reflection and preparation. Great apprehension also would be excited by the severe legal penalties which the plan proposes to attach to that proceeding. The practice (as observed) exists in Scotland; and the commissioners have not been able to discover that it is subject to very frequent failure there, from this cause.

"If such a change were introduced it would not only sweep away the objectionable course of practice connected with *bail below*, but it would effectually preclude the possibility of arresting a party against whom there was no pretence for so proceeding. The interval that would be allowed for putting in bail to the action, might of course be employed by him in making an application to the court, or a judge, founded on such circumstances as will prove that he was manifestly not liable to arrest, upon which he would obtain an order, exempting him from the necessity of complying with the notice, and protecting his person from seizure."

The first part of these suggestions, as to arrest on the affidavit of persons residing abroad, is a proper precaution. With respect to substituting for "bail below" a notice requiring bail to be put in, it may be observed that it is the general practice in the profession to write to a defendant before the arrest takes place, unless there are good grounds for supposing that he will abscond or keep out of the way. We question whether the defendants will like the alternative proposed by the learned Serjeant. However, we feel, with him, more sympathy for the injured creditor than the generally culpable debtor; and the opportunity proposed to be afforded to those who are improperly threatened with arrest, to stay the proceedings in that form, would be an improvement in the administration of justice, though we fear there will be some practical difficulties in the way of such a measure, not easily overcome. Any reasonable modification, however, would be preferable to the abolition entirely of the present power of arrest, which, we are satisfied, is in many instances, highly useful.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

COPYRIGHT.

If an engraving be copied on silk or other material, without the consent of the inventor, it is piracy, and within the statutes protecting prints and engravings, and giving a copyright in them to the inventors.

The plaintiff, an engraver, had engraved a Bird's Eye View of the City of London, which was much admired, and had a great sale. The defendant, a haberdasher in the city of London, contrived to transfer the ingenious device to silk pocket-handkerchiefs, and they also had a rapid sale. The *Vice Chancellor*, upon an *ex parte* application to him, granted an injunction to restrain the defendant from continuing to sell or print any more of these handkerchiefs, on the ground that the print on them was a piracy of the plaintiff's engraving.

The motion to dissolve that injunction was made before the Lord Chancellor.

His Lordship now gave his judgment.—This was a motion to dissolve an injunction obtained *ex parte*, for the purpose of restraining the defendant from continuing to sell or to print a view of the city of London upon silk handkerchiefs, or any other materials, to the injury of the plaintiff's rights. This invention was a species of literary property, and the question in dispute depended upon the construction of the statutes[a], which were passed to protect that property. His lordship was not aware of any case in which the present question was raised; but he did not see any reason to distinguish it from other literary property. There was no doubt but that the printing upon silk or cloth or vellum, without any reference to the use that would be made of them, might be literary piracy. It would be a strange anomaly indeed if printing upon paper should constitute a piracy, and printing the very same thing on other materials, which might be put to additional uses, should not constitute a piracy. In looking closely into the statute of 8 G. 2, c. 13, he found that even a strict construction of it fully supported the plaintiff's right; and it was by departing from that construction of the statute that any question of this sort could arise on it. That statute gave to any person inventing a print, the sole right of printing it. The words of the statute, without reference to the use, and without reference to the nature of the materials, gave to the inventor the sole and exclusive right of printing his own invention. It was contended, in the argument in this Court for the defendant, that the words "sheet or sheets" in the statute, could be intended by the legislature to refer to paper only. Now if that were the true construction of the statute, there was no such a copyright in any thing in this country; for in the statute of Anne, which was the foundation of all the subsequent statutes on this subject of copyright, there were the same words; and the penalty appointed by that statute to be inflicted on the person committing the piracy was, that his work be made "waste paper." From these words it might be plausibly argued, that the statute contemplated protection to works on paper only; and yet no one has hitherto contended, that a book printed on vellum was not within the protection of that act. In no case that has yet occurred was it attempted to give the act a construction, which would go to exclude the most valuable privileges, and quite destroy the advantages of copyright. Now, although the most rigorous construction of the words of the statutes would fully support the plaintiff's rights in this case, still it was to be observed, that those enactments always received a most liberal construction. Lord *Hardwicke*, according to the report of the case in 2 Atkins, denied that the statute of Anne constituted a monopoly, and said, that it ought to be read with a liberal, and not a strict construction. In a later case, of *Clementi* v. *Goulding*, a single sheet of music was held to be within the act. There was no occasion to go beyond the words of the act in this case; and the motion to dissolve the injunction was dismissed with costs. *Havell* v. *Collier*, by the Lord Chancellor, Lincoln's Inn, June 30th, 1832.

[a] 8 Anne, c. 19; 8 Geo. 2, c. 13; 7 Geo. 3, c. 38, and 17 Geo. 3, c. 57.

VICE CHANCELLOR'S COURT.

ENDOWMENT OF PROFESSORSHIP.

A testator founding a professorship of anatomy, makes it a condition of payment of the full salary of the professor, that he procure human bodies for dissection. On representation of the difficulty of complying with this part of the will, and shewing that wax figures substituted were as useful as human bodies, the Court makes a declaration sanctioning the departure from the conditions in the will.

A testator of the name of Lee, by his will, duly executed and published in the year 1755, devised certain estates in the county of Essex to the Dean and Chapter of Christchurch, Oxford, for the purpose of founding a school of anatomy in that college. The professor's salary was to be 100*l.* a year; and the periods at which he was to deliver his lectures on anatomy, and the number of them, were mentioned in the will, which also directed that 40*l.* a year be laid out in procuring anatomical preparations, and two human adult bodies, for the purposes of dissection. The professor was to procure them under the penalty of forfeiting a portion of his salary. Upon a former application to the Court, the salary of the professor was increased to 150*l.* a year, and the sum for procuring bodies for dissection and anatomical preparations, to 80*l.* a year. The present professor not being able to procure the human subjects, under the present laws, without incurring heavy responsibility, was accustomed to use wax figures instead of them for illustrations. The Dean and Chapter, conceiving that this was not in accordance with the will of the founder, but not disapproving of it, required for their indemnity, that the professor should obtain a declaration from this Court justifying them in continuing the salary without deduction to the professor. The professor therefore presented a petition to the Court, praying, amongst other things, a declaration to that effect.

Mr. *Bethel* appeared to support the petition.

The *Vice-Chancellor* thought that the application was a proper one, and made the declaration as prayed for.—*The Attorney-General* v. *Gilpin and others*. V. C. Lincoln's Inn, July 18th, 1832.

KING'S BENCH—PRACTICE COURT.

CHARGING IN EXECUTION—CHANGE OF CUSTODY.

Where a defendant is arrested on a ca. sa. ***and is afterwards removed from the custody of the sheriff, on process from the Court of Chancery, into the Fleet, he is sufficiently charged in execution on the*** ca. sa. ***without***

bringing him up by habeas corpus *and charging him again in execution.*

Humfrey moved for a rule to shew cause why the defendant should not be discharged out of the custody of the Warden of the Fleet, as far as the cause of action in the present case affected him, on the ground, that he had not been charged in execution on it in the Warden's custody. The facts of the case were these: judgment was signed against the defendant in last Trinity Term; and he was taken in July, on a *ca. sa.* returnable in the Michaelmas following. Before the return day of the writ, he was removed out of the sheriff's custody into that of the Warden of the Fleet, on process from the Court of Chancery. The defendant was taken to the Fleet prison, and there still remained in custody on both charges; but without being charged in execution on the judgment in the present case. The defendant ought properly to have been brought up on a *habeas corpus* before a Judge, and charged in execution on the judgment. Without being thus brought up and charged in execution, he is not properly in the custody of the Warden. The judgment of Mr. Justice *Bayley*, in the case of *Rex* v. *The Sheriffs of Middlesex*[a], which was cited by Mr. Justice *Littledale* in his judgment in *Goodman* v. ———[b], contained these directions on the subject. "Where the party is not in the custody of the Marshal, but in the custody of the Warden of the Fleet, and is brought up by *habeas corpus*, for the purpose of being removed from the Fleet, in order to be charged in execution in the King's Bench, the course of proceeding is, that the party is brought to the Judge's chambers, and the Judge makes out the *committitur* by *habeas corpus*." This course not having been adopted, the defendant never was properly in the custody of the Warden of the Fleet. He cited *Filkes* v. *Allen*[c].

Taunton, J.—The defendant was charged in execution on the *ca. sa.* at the time when he was removed to the custody of the Warden. If he had been arrested on a *capias ad respondendum*, you would have been right. The whole difference is on account of the difference of process.

Rule refused.—*Searle* v. *Johnson*. May 8th, 1832. K. B. P. C.

NOTES OF THE WEEK.

House of Lords.

FINES AND RECOVERIES.—LIMITATION OF ACTIONS.—INHERITANCE.—CURTESY.

These Bills remain in the list of business before the House "for second reading;" but it appears by the debates, that Lord Eldon said, these four Bills were of the greatest importance, and if they should be passed, he advised every noble lord, when he retired into the country, to carry with him an eminent lawyer and a most accomplished solicitor to look through all his title deeds, and to tell him how his property really stood. He thought the House should have ample opportunity to examine measures of such immense importance, and therefore hoped they would be postponed till next Session. The Lord Chancellor said, he believed that when his noble and learned friend should bring all the resources of his mind, so skilful in debating with questions of this nature, to bear upon the measures, he would come to the conclusion that they were improvements. However, he acceded to the proposition to postpone them till next Session.

SHERIFFS' EXPENSES.—SEWERS.

These Bills wait for the second reading.

SENTENCE OF DEATH.

This Bill waits for the report.

FORGERY.

This Bill has been brought from the Commons, read a first time, and ordered to be printed.

BANKRUPT LAW AMENDMENT.

Read a second time, and committed to a Committee of the whole House on Tuesday next.

House of Commons.

CHANCERY REFORM.

Mr. Spence stated in the House of Commons on Monday (as perhaps the last opportunity he should have), that the Lord Chancellor, immediately on his coming into office, had applied to individuals who perfectly understood all the details of business in the Court of Chancery, to give their advice and assistance with respect to the reform which he meditated. It was determined there should be three Bills, and he (Mr. Spence) prepared one, which was to be brought into the House immediately after last Christmas. In preparing that measure, he found it next to impossible to introduce a Bill which would interfere with the Masters' offices without touching the others. It was therefore determined to draw up one Bill which should embrace all the offices. After he had prepared that measure, the Lord Chancellor suggested that a general Bill should be introduced. Such a Bill was prepared, and would be shortly laid on the table of one of the Houses of Parliament.

[a] 1 Chit. Rep. 359.
[b] 1 Dowl. Prac. Rep. 128. [c] 2 Str. 1153.

COURT OF CHANCERY.

Mr. Spence's Bill "to diminish the expense and delay of suits in the High Court of Chancery in England in certain cases," has been read a first time, and ordered to be read a second time on the 13th August.

FORGERY.

This Bill has passed the House of Commons.

USURY.

Waiting for second reading.

LUNATICS' COMMISSIONS.

Waiting for further consideration of report.

ECCLESIASTICAL COURTS CONTEMPTS. — EXCHEQUER COURT OFFICERS.

Waiting for Committee.

BANKRUPT ACT AMENDMENT.

This Bill has at length passed the House of Commons.

CHANCERY OFFICES.

Mr. Harvey has given notice of motion for the next Session, of an Inquiry into the state and practice of the offices of the Masters in Chancery, the Six Clerks, and the Registrars, with a view to a cheaper and more efficient system for the dispatch of business in that Court.

JUDGES' CHAMBERS, SERJEANTS' INN.

A Petition of the Law Institution, in their corporate name of "The Society of Attorneys, Solicitors, Proctors, and others not being Barristers, practising in the Courts of Law and Equity in the United Kingdom," complaining of want of accommodation in the rooms or chambers where the Judges preside, was presented by Mr. Freshfield on Wednesday the 1st of August, to the House of Commons, and ordered to lie on the table, and to be printed.

PRESCRIPTION. — ANATOMY. — REMEDIES AGAINST THE HUNDRED.

The *Royal Assent* has been given to these Bills.

SITTINGS IN EQUITY.

MASTER OF THE ROLLS.

His Honor, on Tuesday last, adjourned his Sittings till November.

VICE CHANCELLOR.

His Honor has announced that his sittings will terminate on the 10th instant.

COURT OF REVIEW.

Although this Court will soon adjourn till next term, one of the Judges will remain to act in such cases as cannot admit of delay.

ANSWERS TO QUERIES.

LAW OF PROPERTY AND CONVEYANCING.

LEASE FOR A YEAR. P. 207, *ante.*

In answer to T. P., relative to the clause in the Stamp Act, concerning the progressive duty on a lease for a year, exceeding thirty folios, it is my opinion that a progressive duty is not requisite, provided that the lease does not exceed forty-five folios: above the forty-five folios, I should think that it is necessary.

E. F.

COMMON LAW.

POWERS OF COMMISSIONERS OF PAVING. P. 208, *ante.*

In reference to the query of H. W., I think that the commissioners would be bound to make *A.* some compensation for the injury which he has sustained by paving the street in question. The commissioners have the power of paving the street, but not, I should think, without making some compensation to the owner of property which may be deteriorated in value by such paving; and consequently I think that *A.* can maintain an action against the commissioners for the injury so done.

E. F.

QUERIES.

LAW OF PROPERTY AND CONVEYANCING.

PERSONAL PROPERTY.—DESCENT.

A. B. by will, after giving various pecuniary legacies, bequeathed the residue of his personal property unto his executors, in trust to invest the same upon government or other security, and to apply the interest to the use of the testator's wife for her life; and after her decease, he bequeathed the same to his daughter, upon condition, that if his daughter should die in the life time of her mother (which has been the case), the property which she would have been entitled to after her mother's death, was to be divided amongst the children of his daughter. Without a condition of this sort the husband of the testator's daughter would evidently be entitled to the property; but after an express condition that it should descend to the children, will they not be entitled to it

after the grandmother's death, on their attaining their respective ages of twenty-one years?

H. B. A.

TENANTS IN COMMON.—ELECTIVE FRANCHISE.

A., by will, devises her real estate to *B.*, and *C.* his wife, for their lives, with benefit of survivorship; and after the death of the survivor, to their children, as tenants in common. The children have been some years in possession of the estates in question, and have joined in granting leases to tenants for terms of twenty-one years, under considerable yearly rents. It is therefore required to know, 1st, Whether, under the Reform Act, the husbands of those children (some being sons and the others daughters) can claim their elective franchise? 2dly, Whether their tenants have the like privilege?

ASPIRO.

MISCELLANEA.

NEWGATE CHAPEL.—THE CONDEMNED PEW.

In the centre of Newgate there is a chapel, which will contain all the inmates of the prison. The duties of the chapel are performed by the Ordinary, a clergyman of the established church. Every prisoner, except those who are sick, and those who act as servants in the prison, attends the chapel once a day during the week, for about half an hour, and twice on Sundays, when the ordinary church service is performed, and a sermon is delivered to the prisoners. In the chapel, as elsewhere, there is some classification of the prisoners. A gallery to the south is given to the women, who are screened by a curtain. The opposite gallery is usually filled by capital convicts, whose sentences have been remitted, and others under sentence of transportation. Beneath the two galleries, sit the mass of prisoners for trial; and between these, in the body of the chapel, other prisoners for trial, of what is called "the more respectable class,"—that is, persons who arriving at the prison well-dressed, and strangers to the keeper, are placed in a yard by themselves; as well as the schoolmaster and his boys, who sit round the communion table, opposite to the pulpit.

In the midst of the chapel is a large pew, painted black, which is called *the Condemned Pew*. Those who sit in it are visible to the whole congregation, and still more to the Ordinary, whose desk and pulpit front the centre of the condemned pew, within a couple of yards of it. On either side of the pulpit is a small gallery, one called the sheriffs', and the other the keeper's, both of which are occasionally occupied by strangers. The condemned pew, it will be understood, is the seat of prisoners under the sentence of death. It is more or less filled by the results of every Old Bailey sessions, and is emptied by each decision of the Council, which consigns some of those who had occupied it to the hulks, and the rest to the gallows. Let it be supposed that the condemned pew has been lately emptied, and that a new batch of convicts has just been sentenced to death. On the following morning, all the inhabitants of the cells attend the service, and sit in the condemned pew. Their demeanor on the occasion, as well as that of the other prisoners, is highly instructive. In that of the mass of prisoners, one observes an expression of pity and respect towards the convicts; but that of the convicts shews many differences of feeling. Some tremble, and sigh or weep;—some swagger to their places, tossing their heads, smiling, nodding to their friends, and pretending to glory in the distinction of their danger: others appear stupified, creeping into the pew, looking around them vacantly, as if unconscious of their state; and some again behave with real composure, appearing, as they are at the time, proud of the distinction of being amongst the condemned, but without any admixture of fear: since these last are either boys, whose youth they know protects them, or men convicted of offences, such as returning from transportation, which are never punished with death—or criminals, so hardened by constant contemplation of death by the hangman, that they can look forward to it as their own fate with comparative indifference. The entrance of a new batch of convicts into the condemned pew, creates some sensation amongst the other prisoners, and produces a display of various feelings amongst the condemned themselves. But after the day when the condemned pew is re-filled, a stranger visiting the chapel would be at a loss to distinguish the capital convicts from the great mass of prisoners for trial. If, however, he were to attend the chapel after an interval of some weeks, he would observe a striking change in the physical condition of most of the capital convicts. In several instances, I have seen brown hair turned grey, and grey white, by a month of suspense, such as most London capital convicts undergo. In the same short period, the smooth face of a man of twenty-five becomes often marked with decided wrinkles on the forehead, and about the eyes and mouth; and in certainly three cases out of four, one month of the cells of Newgate causes a great diminution of flesh over the whole body. "How thin he grows!" is the common remark of the other prisoners, when speaking of one who has passed a month in the condemned pew. But except these changes in the physical state of persons under sentence of death, their appearance in the condemned pew presents nothing remarkable, after the first day or two, when the novelty of their situation has worn off. At length the suspense of the majority is ended by the decision of the Council; and these, on the following day, appear in a gallery of the chapel, placed in the front row, for the purpose, I conclude, of more fully seeing and being seen by their late comrades, who still remain in the condemned cell. On first meeting in the chapel after their separation, the two parties generally regard each other with fixed attention, and are closely watched by the rest of the congregation. What their respective feelings may be on the occasion, I pretend not to divine.—*Wakefield's Facts relating to the Punishment of Death.*

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> ——— "Quod magis ad nos
> Pertinet, et nescire malum est, agitamus."
> HORAT.

LETTERS TO THE LORD CHANCELLOR.

LETTER IX.

ON A RECENT OCCURRENCE.

My Lord,

I HAVE waited with some anxiety for an explanation of the circumstance connected with your Lordship which has last excited universal attention. As your humble but sincere admirer, I had hoped that you would have taken some opportunity of reverting to a late extraordinary speech—of contradicting the alleged insult to Sir Edward Sugden, or of making some sort of apology. This may still come; and Heaven grant that it may! for I cannot yet bring myself to consider that the expressions alluded to were uttered by your Lordship. I know there is an attempt in some quarters to shuffle off this matter as a joke—to treat it as harmless playfulness—a mere sportive freak. I confess, I cannot view it in this light. I will not believe it to be true. I will not believe that the offensive part of the speech was ever uttered. But admitting it to be true (and most heartily do I wish that the imputed utterance had been contradicted), it appears to me to involve a most important question. Jest or earnest—deliberate or accidental, (admitting that the whole speech, as reported, was spoken)—it comes to this, whether a Lord Chancellor has a right, intentionally or unintentionally, to use language in Parliament, to a member of his Court, which no gentleman dare use to another—which no gentleman would, in fact, use at all;—whether a Judge, being screened from all personal consequences, is to abuse his situation by heaping unmeasured insults on a Barrister, in a place where he has no power of reply;—and whether there be any remedy. I am mistaken if these are not the questions which are now asked, at least by the profession, if not by the public; and the answer I believe to be, that there is a mode of restraining a Lord Chancellor or Judge who should so act.

I believe these offensive words were never uttered by your Lordship, because your friends in the other House, Lord Althorp and the Attorney-General, were eager to declare themselves of that opinion, when the matter was there brought forward. Expressing this belief, permit me to inquire into what has been imputed to your Lordship, and to mention the means—in your Lordship's case never to be employed—of restraining a Lord Chancellor from acting in a manner so unworthy of him.

The case stands thus. Certain sinecure offices become vacant. Your Lordship had for many years expressed the most confident opinion that these offices were utterly useless, and should be abolished. You had reiterated this opinion after your acceptance of the Great Seal, and had in fact assented to a draught of a bill abolishing these offices. They fall vacant. You are silent on the subject in the House of Lords, but appoint your brother to these offices. Now, this appointment, unaccompanied by any explanation, would seem to say that these offices were to be continued. Acting on this presumption, Sir Edward Sugden, a political opponent of your Lordship's party, gives notice to the Solicitor General that he shall ask, in the House of Commons, whether the appointment is provisional. He asks the question; but neither the Solicitor General nor Lord Althorp, nor any one else, can

answer it; and the matter drops. The next day your Lordship indignantly declares that your intention, as to the abolishing the offices, remains unaltered. In stating this, it is reported that you spoke, amongst other things, as follows. I quote the Mirror of Parliament, as the more accredited account. "I cannot suppose that the honourable and learned gentleman (Sir Edward Sugden) was influenced by any thing but an earnest and creditable desire of obtaining information—a desire which, when existing in a high degree, philosophers have always eulogised as the distinguishing attribute of human nature. *Yes, we have all read that it is this heaven-born thirst of information that most distinguishes man from the lower animals—from the crawling reptile; from the wasp that stings, and from the wasp that fain would, but cannot sting;—that distinguishes man, not only from the insect that crawls and stings, and which, though it stings, is still only an insect; but from that more powerful, because more offensive creature, the bug,—which, powerful and offensive as it is, is still but vermin.*[a]" How easily can I believe that your Lordship's friends could not believe that you had uttered this language! Would one tenth part have been permitted for one moment in the presence of gentlemen? Is its vulgarity in any way redeemed? Is it lightened by wit, humour, or imagination? No, it is unadulterated coarseness. It requires little cleverness to call a man a wasp, or bug, or vermin. I I suppose that a blackguard, at all nice in his language, would hardly venture upon them. They would merely soil him who used them. Offensive only to good taste, they could but injure him who employed them.

If the circumstances are as I have stated them, there is a manifest presumption that these words could not have been used by your Lordship, first, because no gentleman —much less a Lord Chancellor—could have used them; and, secondly, because there was positively no provocation for any hard language at all. Supposing them to have been used, your Lordship's enemies explain the matter by quoting the remonstrance of Fag, in the Rivals, to his master, "that he had no objection to tell a lie, *but it hurt his honour to be found out.*" They are malicious enough to say, that your Lordship would not have been so sensitive had you not really intended to do the thing of which Sir Edward Sugden complained. They declare that human experience shews, that detection in a little matter of this kind, and prevention from completing it, affects the mind much more acutely than an unjust accusation. They applaud your fraternal feeling, and admire the length to which you would have gone to gratify it; and knowing this, they cannot reconcile it with your present declaration, that the offices to which you have appointed your brother will in fact be a loss, and not a benefit to him. However righteous your motive, they are not satisfied with the reasons given for your conduct. They say that the deputy might easily have been armed with full powers to perform the duties of the office, and that no new principal was necessary. They readily believe your assertion, that not "one jot or tittle" of the proposed bill shall be altered; but they have discovered that there was a clause for giving compensation to the holders of these offices, and they are unjust enough to suppose that your brother was to have the benefit of it. All this, my Lord, is said by your enemies; and much more that I need not repeat. For my own part, if I believed the words to have been uttered, I could only account for them on similar grounds; but I cannot believe that they were uttered.

But, let me ask, if they had been spoken, are there no means of preventing the repetition of the offence? I think there are. If a member of the bar is thus deliberately and intentionally insulted, and the offender is placed in a situation which prevents the person offended from avenging the insult himself, it becomes the affair of the whole body. The offence to the individual is merged in the offence to the profession; and they should shew their sense of the injury done to them. No one was more willing than your Lordship, when at the bar, to assert your privileges as one of its members, and insist on their power and importance. No one will more readily remember than your Lordship, that the brightest jewel of the English bar is its independence. Supposing, then, that a Lord Chancellor shewed a determination to insult its members, and bring them into contempt, they have at least this remedy. It is their duty to the public, not to impede the business of the Court; but that good feeling which has always existed between the Bench and the Bar, should cease. No opportunity should be lost in shewing, that all respect or regard for the person holding the office, had ceased, and, of course, every legitimate mode of opposing him should be employed. A Lord Chancellor would soon find how impossible it was to

[a] Mirror of Parliament for 1832, p. 3371.

continue in office without the good feeling of the Bar. I am not aware that the case has ever occurred; but I have exceedingly mistaken the influence and power of the profession, once united against a Lord Chancellor, if they have not power to drive him from his place. I admit that this remedy should not be hastily resorted to; but once let a deliberate attempt be made to insult or oppress its members, and no moment should be lost in trying the remedy.

Far be it from me, my Lord, to say that that attempt has been made, or will ever be made by your Lordship; but not even your power and influence would abide the issue.

I have the honour to be,
My Lord,
Your Lordship's most obedient servant,

A Barrister.

Lincoln's Inn,
Aug. 6, 1832.

P. S. Since this was printed, it has given me the greatest pleasure to see that your Lordship *has* alluded to this transaction in the House of Lords. My first impression was to suppress this letter; but as you have now done all that can be expected, it may be more satisfactory to all parties to let it remain.

Aug. 8, 1832.

NEW BILLS IN PARLIAMENT.

ANALYSIS OF A BILL ENTITLED "AN ACT TO ABOLISH CERTAIN SINECURE OFFICES CONNECTED WITH THE COURT OF CHANCERY."

Reciting, that it is expedient that the offices thereinafter mentioned should be abolished as soon as provision can be made for the due performance of the duties thereunto belonging.

It is therefore proposed to be enacted—

1. That the offices of Keeper or Clerk of His Majesty's *Hanaper*, the *Patentee* of the *Subpœna Office*, the *Registrar of Affidavits*, the *Clerk of the Crown* in Chancery, the *Clerk of the Patents*, the *Clerk* of the *Custodies* of *Lunatics* and *Idiots*, and the *Patentee* for the Execution of the Laws and Statutes concerning *Bankrupts*, shall cease after 15th April next.

2. Provided, That the act shall not be construed to determine any of the offices holden by any person appointed on or before 1st June last, until the decease of such person.

ANALYSIS OF A BILL FOR REGULATING THE PROTESTING FOR NON-PAYMENT OF BILLS OF EXCHANGE DRAWN PAYABLE AT A PLACE NOT BEING THE PLACE OF THE RESIDENCE OF THE DRAWEE OR DRAWEES OF THE SAME.

Reciting that doubts having arisen as to the place in which it is requisite to protest for non-payment bills of exchange, which on the presentment for acceptance to the drawee or drawees shall not have been accepted, such bills of exchange being made payable at a place other than the place mentioned therein to be the residence of the drawee or drawees thereof: And that it is expedient to remove such doubts: It is therefore proposed to be enacted, That from and after the *passing of this act*, all bills of exchange wherein the drawer or drawers thereof shall have expressed that such bills of exchange are to be payable in any place other than the place by him or them therein mentioned to be the residence of the drawee or drawees thereof, and which shall not on the presentment for acceptance thereof be accepted, shall or may be, without further presentment to the drawee or drawees, protested for non-payment in the place in which such bills of exchange shall have been by the drawer or drawers expressed to be payable, unless the amount owing upon such bills of exchange shall have been paid to the holder or holders thereof on the day on which such bills of exchange would have become payable had the same been duly accepted.

ANALYSIS OF A BILL FOR MAKING PROVISION FOR THE LORD HIGH CHANCELLOR OF ENGLAND, IN LIEU OF FEES HERETOFORE RECEIVED BY HIM.

Reciting that by 55 G. 3, divers sums of money have been, by virtue of several orders of the Court of Chancery from time to time, taken out of the common and general cash belonging to the suitors of the High Court of Chancery, which lay dead and unemployed in the Bank of England, and have been placed out in the name of the accountant general of the said Court on government or parliamentary securities, and such government or parliamentary securities have been, in pursuance of the said acts, carried to an account, intituled, "Account of monies placed out for the benefit and better security of the suitors of the High Court of Chancery," and out of the dividends and interest of the securities purchased in pursuance of the said several Acts, several annual sums and salaries to the Master of the Report Office, and to the Registrars and entering clerks, and to their clerks, and several other payments thereby directed to be made and paid, have been from time to time made and paid, and the surplus interest and annual produce arising from the said securities, beyond what was sufficient to answer the several payments thereby, and by the several other acts therein mentioned or referred to, directed to be made and paid, and also the interest produced from the securities purchased with such surplus interest and annual produce, have been from time to time, in pursuance of the said last-mentioned act,

laid out in the purchase of government or parliamentary securities, in the name of the Accountant General of the said Court, and placed to the credit of an account, intituled, "Account of securities purchased with surplus interest arising from securities carried to an account of monies placed out for the benefit and better security of the suitors of the High Court of Chancery:"

And reciting 53 G. 3, c. 24., by which it is enacted, that out of the common and general cash belonging to the suitors of the Court of Chancery, which did then or should thereafter lie dead and unemployed in the Bank of England, the said Court was empowered from time to time to order any sum, not exceeding sixty thousand pounds, to be placed out in one sum or in parcels, in the name of the Accountant General of the said Court, on government or parliamentary securities, and that such securities should be carried to the said account, intituled, "Account of monies placed out for the benefit and better security of the suitors of the High Court of Chancery," and should be made part of the same account; and out of the interest and dividends of all or any of the securities purchased out of the said common and general cash, in pursuance of the several former acts therein mentioned or referred to, purchased, and to be purchased in pursuance of the now reciting act, there should be paid by the governor and company of the bank of England, by virtue of any orders to be made by the said court for that purpose, amongst other yearly payments thereby directed, the net yearly sum of 5000*l.* to the Vice Chancellor of England for the time being; and it was thereby further enacted, that the Lord Chancellor should, from the time a Vice Chancellor should be appointed, pursuant to the now reciting act, out of the fees and emoluments belonging to and received in respect of the custody of the great seal or otherwise, pay or cause to be paid to the governor and company of the Bank of England the net yearly sum of 2500*l.* by quarterly payments, and that all such sums of money, when so paid, should be carried to the account of the interest and dividends of the several securities standing in the name of the Accountant General thereinbefore mentioned or referred to, and be applied to all the purposes to which such interest and dividends then were or might be applicable:

And reciting that the yearly sum of five thousand pounds is now paid and payable to the Lord Chancellor, at His Majesty's Exchequer by and out of the consolidated fund; and that it is expedient that such yearly payment should, from and after the fifth day of January last, cease and be no longer payable, and that a like yearly payment or yearly sum of five thousand pounds should, from and after the said fifth day of January last, be paid to the Vice Chancellor of England for the time being, by and out of the consolidated fund, in lieu and stead of the yearly payment of five thousand pounds provided for such Vice Chancellor by the last-recited act:

And reciting that the Clerk of the Crown, the Clerk of the Letters Patent, the Secretary of Fines, and the Purse Bearer to the Lord Chancellor, Lord Keeper and Lords Commissioners of the Great Seal for the time being, or their several and respective deputies, clerks or agents, have from time to time and do now receive various fees and emoluments, which are due and of right payable for business done and transacted by them in or by virtue of their respective offices, to and for the use and on the account of the Lord High Chancellor, Lord Keeper and Lords Commissioners of the Great Seal of Great Britain for the time being, which mode of remuneration is very uncertain, as well as derogatory to the dignity of such office; and it is expedient that a more certain and adequate provision should be made for the Lord Chancellor, Lord Keeper or Lords Commissioners, in lieu and stead of such fees; and that the annual payment of 2500*l.*, so by the last-recited act directed to be made and paid by the Lord Chancellor, Lord Keeper or Lords Commissioners of the Great Seal for the time being, in the manner and for the purposes thereby directed and provided, should, from and after the 5th day of January, 1832, cease and be no longer payable; and that the annual sum of 5000*l.* thereby directed to be paid to the Vice Chancellor of England out of the interest and dividends of the several stocks, funds, and securities standing in the name of the Accountant General of the Court of Chancery to the two several accounts first hereinbefore mentioned, should, from and after the said fifth day of January, 1832, be no longer paid or payable out of such interest and dividends, but that the same annual sum of 5000*l.* accruing and to accrue due from and after the said fifth day of January last, should thenceforth be paid and payable to the Vice Chancellor of England for the time being, by and out of the said consolidated fund:

And reciting that it is expedient that a further sum, out of the common and general cash belonging to the suitors of the said Court, now lying dead and unemployed in the bank of England, should be laid out and invested in the public stocks, funds and securities, and carried to the account hereinafter mentioned, the better to answer and satisfy, by and out of the dividends and interest thereof, the several annual payments hereby and by any and every former act and acts of parliament now or hereafter to be subsisting and payable thereout:

It is therefore proposed to be enacted, that out of the common and general cash belonging to the suitors of the Court of Chancery, which now lies or shall hereafter lie dead and unemployed in the Bank of England, a sum, not exceeding the sum of *one hundred and fifty thousand pounds*, shall and may, by virtue of any order or orders of the said Court to be made for that purpose, from time to time be placed out in one entire sum, or in parcels, in the name of the Accountant General of the said Court, according to the general rules and orders of the said Court, on such government or parliamentary securities as by such order or orders shall be directed; and such

securities shall be carried to the said first mentioned account, intituled, "Account of monies placed out for the benefit and better security of the suitors of the High Court of Chancery," and shall be made and form part of the same account.

That it shall and may be lawful for the Lord Chancellor, by any order or orders of the said Court of Chancery, to change the security or securities to be purchased pursuant to this act, or any part or parts thereof, for other government or parliamentary securities, and again to change such securities respectively from time to time, and to give all necessary directions for such purposes.

That if at any time hereafter the whole or any part of the money so to be placed out and invested pursuant to this act, shall be wanted to answer any of the demands of the suitors of the said Court of Chancery, then and in such case the said Court may and shall direct the same, or any part thereof, to be called in, or the securities on which the same shall be placed to be disposed of, in order that the suitors of the said Court may at all times be paid their respective demands out of the common and general cash belonging to such suitors.

That so much of the said act made and passed in the fifty-third year of the reign of his late majesty King George the Third, intituled, "An act for facilitating the administration of justice," as enacts, that out of the interest and dividends of all or any of the securities purchased out of the common and general cash in pursuance of former acts, and to be purchased in pursuance of that act, there shall be paid by the governor and company of the bank of England the net yearly sum of 5000*l.* to the Vice Chancellor of England for the time being; and so much of the said act as directs that the Lord Chancellor, Lord Keeper or Lord Commissioners for the time being should, from the time a Vice Chancellor should be appointed as therein mentioned, out of the fees and emoluments belonging to and received in respect of the custody of the Great Seal, or otherwise, pay or cause to be paid to the governor and company of the Bank of England, the net yearly sum of 2500*l.*, in manner therein mentioned, shall be, and the same is hereby repealed; and all quarterly payments of the said annual sum of two thousand five hundred pounds, which are or would have accrued due thereon, shall from and after the 5th day of January last, cease and be no longer paid or payable.

That out of the interest and dividends of the government or parliamentary securities now or hereafter to be carried to the said two several above-mentioned accounts, intituled "Account of monies placed out for the benefit and better security of the suitors of the High Court of Chancery," and "Account of securities purchased, with surplus interest arising from securities, carried to an account of monies placed out for the benefit and better security of the suitors of the High Court of Chancery," there shall be paid by the governor and company of the Bank of England, without any draft from the accountant general of the said Court, (but subject and without prejudice to the payment of all salaries and sums of money by any former act directed or authorized to be paid thereout), the net yearly sum of *Ten Thousand Pounds* to the Lord Chancellor or Lord Keeper, or Lords Commissioners of the Great Seal of Great Britain for the time being, as and for a yearly salary, to be paid from time to time quarterly, free and clear of and from all taxes, deductions or abatements whatsoever out of the same or any part thereof, and to commence and be computed from the said Fifth day of January one thousand eight hundred and thirty-two, and to be from thenceforth payable quarterly on the Fifth day of January, the Fifth day of April, the Fifth day of July, and the Tenth day of October in every year, by equal portions; the first quarterly payment thereof to be paid and payable as due on the Fifth day of April now last past; and that if any Lord Chancellor or Lord Keeper, or Lords Commissioners of the Great Seal for the time being, shall die or resign, the executor or administrator of the Lord Chancellor or Lord Keeper or Lords Commissioners so dying, and the Lord Chancellor or Lord Keeper or Lords Commissioners so resigning, shall be entitled to receive, and shall be paid such proportionable part of the salary aforesaid as shall have accrued during the time that such person or persons shall have executed the office of Lord Chancellor or Lord Keeper or Lords Commissioners since the last quarterly payment thereof; and that the succeeding Lord Chancellor or Lord Keeper or Lords Commissioners shall be entitled to receive a like portion of the salary as shall be accruing or shall accrue from the day of the death or resignation of the preceding Lord Chancellor or Lord Keeper or Lords Commissioners.

That it shall and may be lawful to and for the Clerk of the Crown, the Clerk of the Letters Patent, the Secretary of Fines, and the Purse Bearer to the Lord Chancellor for the time being, and their successors in the said several offices, and each and every of them, and their several and respective deputies, clerks or agents, to have, receive and take all and every the fees and emoluments which have been accustomed to be paid, and which are of right to be paid and payable and received by them respectively by virtue of their said several offices or appointments, or any of them, for the use and on the account of the Lord Chancellor, Lord Keeper or Lords Commissioners of the Great Seal for the time being, which shall hereafter accrue due and become payable, since the 5th day of January, 1832, for the business done by them respectively in their said offices, and that such fees and emoluments as have accrued and been received between the said 5th day of January and the 5th day of July, 1832, shall be forthwith accounted for and paid by them respectively into the Bank of England, in the name of the Accountant General of the said Court, to an account to be intituled, "An account of fees

formerly payable to the Lord Chancellor;" and that such fees or emoluments which have or shall accrue due and payable, from and after the fifth day of July, 1832, shall in like manner be accounted for and paid as aforesaid once in every three months; and that such fees shall on each payment be verified by the oath of the accounting party, and such payment into the Bank to the said last-mentioned account shall be certified by the Accountant General of the said Court to the Lord Chancellor, or in such other manner as he shall by any order of the said Court direct.

[*To be concluded in our next.*]

DISSERTATIONS ON CONVEYANCING.

No. V.

ON THE PRESUMPTION OF SURRENDERS OF TERMS OF YEARS.

A CASE having been just reported of great importance, on the subject of presuming the surrender of terms to attend the inheritance, it will be useful to state the prior state of the law on the subject. It was a rule of Lord Mansfield, that he would never suffer a plaintiff in ejectment to be nonsuited by a term outstanding in his own trustee; but would, in such cases, direct the jury to presume the surrender of the term [a]. This rule has been carried very far in two late well known cases. In *Doe* d. *Burdett* v. *Wright* [b], a term of 1000 years was created by deed in 1717, and in 1735, was assigned for the purpose of securing an annuity to *A.*, and after that to attend the inheritance. *A.* died in 1741; and the owner of the inheritance and his devisee remained in undisturbed possession of the premises from 1735 to 1813, without any notice having been taken of the term, except that, in 1801, the devisee, in whose possession the deeds creating and assigning it were found, covenanted to produce them when called for. An ejectment having been brought by the heir at law, the Judge directed the jury to presume a surrender of the term; and the Court of King's Bench, consisting of Lord *Tenterden*, C.J. and *Bayley*, *Holroyd*, and *Best*, JJ. held that such direction was right. In the subsequent case, of *Doe* d. *Putland* v. *Hilder* [c], a term of years was created in 1762, and assigned over to a trustee in 1779, to attend the inheritance. In 1814, the owner of the inheritance executed a *marriage settlement*; and in 1816, he conveyed his life interest in the estate to a purchaser, as a security for a debt; but no assignment of the term or delivery of deeds relating to it took place on either occasion. In 1819, an actual assignment of the term was made by the administrator of the original trustee to a new trustee, for the purchaser in 1816. An action of ejectment was brought against the purchaser by a prior incumbrancer; but the Judge directed the jury to presume a surrender; and the Court of King Bench again held such direction to be right, Lord *Tenterden* delivering a very elaborate judgment on the point. These cases excited great attention among the profession, and met with much disapprobation, not only from many eminent conveyancers, but also from the Bench. Lord *Eldon*, Chief Baron *Richards*, and Baron *Graham* repeatedly declared that they could not assent to them [d]. The new doctrine, however, met with some support. Mr. Stewart has collected the cases in which it has been recognized [e]. Thus, in *Bartlett* v. *Downes* [f], the jury was directed to presume a surrender, principally on the ground that the term was not actually assigned to attend the inheritance on the last purchase, there being a mere declaration on that occasion that all terms should attend. In *Townshend* v. *Champernown*, 1 Yo. and Jer. 449. *Alexander*, C. B. said, that until a different decision was pronounced he should recognize the authority of *Doe* v. *Hilder*; and in *Emery* v. *Growcock* [g], where a term had *never* been assigned to attend the inheritance, but had remained unnoticed for fifty years, although the estate had remained in the same family during the whole of that period, Sir *John Leach*, V. C. held, that he would presume its surrender [h]. This was the state of the law; and it was generally supposed that the Court of King's Bench would adhere to its own doctrine, although it was certainly not acted on in practice to any extent by conveyancers. It was highly desirable that, if possible, the law should be settled, as the point was constantly occurring, and it was difficult to know how to advise on it. The subject has very lately been brought before the Court of King's Bench, in the case of *Doe* d. *Black-*

[a] *Lade* v. *Holford*, 3 Burr. 1416. *Doe* d. *Bristow* v. *Pegge*, 1 T. R. 758, n.

[b] 2 B. & Ald. 710. [c] 2 B. & Ald. 782.

[d] Sug. V. & P. 440, 8th edit.; *Mole* v. *Smith*, Jac. 490.

[e] 3 Stew. Prac. Convey. pp. 467—469.

[f] 3 B. & C. 616. S. C. 5 D. & R. 526.

[g] 6 Madd. 54.

[h] And see *Ex parte Holman*, Sug. V. & P. 447; and *Cook* v. *Soltau*, 2 Sim. & Stu. 154.

nell v. *Plowman*[1], in which a term of 1000 years was created in 1772, by way of mortgage. In 1787, the principal sum and interest were paid, and the term was assigned to a trustee, in trust for the devisees of the person who created the term. In 1789, the premises were conveyed to a purchaser by deed, and the term was assigned in trust for the purchaser, her heirs and assigns, and to attend the inheritance. The purchaser entered into possession of the premises, and continued so possessed till her death. In 1808, she executed a marriage settlement; and in 1813, having reserved a power for that purpose, she devised all her real estate. There was no mention of the term, either in the settlement or will. She and her husband having both died, an ejectment was brought by her heir at law, and *Bayley*, J. who tried it, reserved the point whether it was competent for the defendants to set up the term against the plaintiff. Mr. *Coote*, for the plaintiff, relied on the cases of *Doe* v. *Wright*, and *Doe* v. *Hilder*, which, he said, were directly in point. "Lord *Tenterden*, C. J.—The doctrine laid down in those cases, I believe, has been much questioned. Is such a term as this usually noticed in a marriage settlement? Mr. *Coote*.—It certainly is not the general practice to notice such terms. Lord *Tenterden*, C. J.—If that be so, there is no ground for presuming that the term which was assigned to attend the inheritance was ever surrendered. *Parke*, J.—It being admitted that, in point of practice, it is not usual to notice such a term as this in a marriage settlement, there is not a single fact in the case from which a surrender of the term could be presumed. That being so, the legal estate is not in the lessor of the plaintiff, and the judgment must be for the defendants. *Littledale* and *Taunton*, JJ. concurred. Judgment for the defendant."

By this case, therefore, the authority of *Doe* v. *Wright*, and *Doe* v. *Hilder*, is much shaken. The latter of these cases may be considered as directly overruled; and it must be considered, that the marriage settlement of the owner of the inheritance shall not, in future, be a ground for presuming the surrender of the term. It will be seen, that it is not in such direct opposition to *Doe* v. *Wright*, although it materially lessens its weight. The case of *Doe* d. *Blackman* v. *Plowman*, revives the former law on the subject of presuming the surrender of terms; and it is no small triumph to the conveyancers, to have induced the Court of King's Bench to overrule its own decisions, and act in conformity to their constant practice.

[1] 2 B. & Ad. 573.

SCHEDULES OF THE REFORM ACT, 2 W. 4, c. 45.

It was deemed unnecessary to insert the Schedules of the Reform Act, on the supposition that all our readers would be in possession of the Act itself, or some one of the numerous treatises on the subject; but being informed that they will be useful to refer to, we now have abridged and introduced them, alphabetically arranged, with a statement of the number of Members returned by each Borough and County—omitting Schedule C, which was given at p. 213 *ante*. All the places in that Schedule return two Members.

Schedule (A.)

Boroughs Disfranchised.

Aldborough
Aldeburgh
Amersham
Appleby
Bedwin (Great)
Beeralston
Bishop's Castle
Blechingley
Boroughbridge
Bossiney
Brackley
Bramber
Callington
Camelford
Castle Rising
Corfe Castle
Downton
Dunwich
East Grinstead
East Looe
Fowey
Gatton
Haslemere
Hedon
Heytesbury
Higham Ferrers
Hindon
Ilchester
Lostwithiel
Ludgershall
Milborne Port
Minehead
Newport
Newton
Newtown
Okehampton
Orford
Plympton
Queenborough
Romney (New)
St. Germain's
St. Mawe's
St. Michael's, or Midshall
Saltash
Sarum (Old)
Seaford
Steyning
Stockbridge
Tregony
West Looe
Wendover
Weobly
Whitchurch
Winchelsea
Wootton Bassett
Yarmouth

Schedule (B.)

Old Boroughs, to return one Member.

Arundel
Ashburton
Calne
Christchurch
Clitheroe
Dartmouth
Droitwich
Eye
Grimsby (Great)
Helston

Horsham	Reigate
Hythe	Rye
Launceston	St. Ives
Liskeard	Shaftesbury
Lyme Regis	Thirsk
Malmesbury	Wallingford
Midhurst	Wareham
Morpeth	Westbury
North Allerton	Wilton
Petersfield	Woodstock

Schedule (D.)

New Boroughs, to return one Member.

Ashton-under-Lyne	Merthyr Tydvil
Bury	Rochdale
Chatham	Salford
Cheltenham	South Shields
Dudley	Tynemouth
Frome	Wakefield
Gateshead	Walsall
Huddersfield	Warrington
Kendal	Whitby
Kidderminster	Whitehaven

Schedule (E.)

Places sharing in the Election of one Member.	Sharing with the following Principal Boroughs.
Aberystwith	Cardigan
Adpar	Cardigan
Amlwch	Beaumaris
Bangor	Caernarvon
Caergwrley	Flint
Caerwis	Flint
Conway	Caernarvon
Cowbridge	Cardiff
Criccieth	Caernarvon
Fishguard	Haverfordwest
Holt	Denbigh
Holyhead	Beaumaris
Holywell	Flint
Kevinleece	Radnor
Knighton	Radnor
Knucklas	Radnor
Lampeter	Cardigan
Llanelly	Caermarthen
Llanfyllin	Montgomery
Llangefni	Beaumaris
Llanidloes	Cardiff
Llantrissent	Cardiff
Machynlleth	Montgomery
Milford (Town of)	Pembroke
Mold	Flint
Narbeth	Haverfordwest
Nevin	Caernarvon
Newtown	Montgomery
Overton	Flint
Presteigne (Town of)	Radnor
Pwllheli	Caernarvon
Ruthin	Denbigh
Rhayder	Radnor
Rhyddlan	Flint
St. Asaph	Flint
Tenby	Pembroke
Welsh Pool	Montgomery
Wiston	Pembroke
Wrexham (Town of)	Denbigh

Schedule (E. 2.)

Places sharing in the Election of Members.	Places from which the Seven Miles are to be calculated.
Aberavon	Bridge over the Avon
Aberystwith	Rheidal Bridge
Adpar	Teivi Bridge
Caergwrley	Hope Church
Caerwis	Parish Church
Conway	Parish Church
Cowbridge	Town Hall
Criccieth	The Castle
Holt	Parish Church
Ken-fig	Church of Lower Ken-fig
Kevinleece	Parish Church
Knighton	Parish Church
Knucklas	Site of Castle of Gnweglas
Lampeter	Parish Church
Llantrissent	Town Hall
Loughor	Parish Church
Neath	Town Hall
Nevin	Parish Church
Newport	Market Place
Overton	Parish Church
Pwllheli	Guildhall
Rhayder	Market Place
Rhyddlan	Parish Church
Ruthin	St. Peter's Church
Swansea	Town-Hall
Tenby	Parish Church
Usk	Town Hall
Wiston	Parish Church

Schedule (F.)

Counties to be divided and return four Members each.

Cheshire	Northumberland
Cornwall	Northamptonshire
Cumberland	Nottinghamshire
Derbyshire	Shropshire
Devonshire	Somersetshire
Durham	Staffordshire
Essex	Suffolk
Gloucestershire	Surrey
Kent	Sussex
Hampshire	Warwickshire
Lancashire	Wiltshire
Leicestershire	Worcestershire
Norfolk	

Schedule (F. 2.)

Counties to return three Members each.

Berkshire	Herefordshire
Buckinghamshire	Hertfordshire
Cambridgeshire	Oxfordshire
Dorsetshire	

Schedule (G.)

Cities and Towns and Counties thereof.	Counties at large in which Cities and Towns and Counties thereof are to be included.
Caermarthen	Caemarthenshire
Canterbury	Kent
Chester	Cheshire
Coventry	Warwickshire
Gloucester	Gloucestershire
Kingston-upon-Hull	E. Riding of Yorkshire

SCHEDULE (G) *continued.*

Lincoln - -	The Parts of Lindsey, Lincolnshire
London - - -	Middlesex
Newcastle-upon-Tyne	Northumberland
Poole - - -	Dorsetshire
Southampton - -	Hampshire
Worcester - -	Worcestershire
York and Ainsty -	N. Riding of Yorkshire

CONSTRUCTION OF BANKRUPT ACT.—PURCHASE.

By sect. 81. of the Bankrupt Act, 6 G. 4. c. 16, it is enacted, "That all conveyances by any bankrupt *bonâ fide* made more than two calendar months before the date and issuing of the commission against him, shall be valid, *notwithstanding any prior act of bankruptcy by him committed*; provided the person so dealing with such bankrupt had not at the time of such conveyance notice of any prior act of bankruptcy by him committed." I trouble you with this enactment, in order to ascertain the sense in which your intelligent professional readers receive it. An impression appears to have been made upon the minds of some gentlemen (occasioned, I imagine, by a rather too inattentive perusal of the language), that any conveyance from a trader (however *bonâ fide*, and whether preceded by an act of bankruptcy or not) may be set aside by his assignees, if it were not made more than two calendar months prior to the date of a commission of bankruptcy against him. This impression, I submit, is erroneous; and the error, I conceive, arises from not duly considering that the clause is intended to be *protective* to honest purchasers. It, in effect, speaks to them thus: "Your conveyances are *at present* unimpeachable by the vendor's assignees, even if a commission issue the next day, *where* NO *act of bankruptcy had been committed at the time they were made*; I will now give you *an additional* safeguard to support a purchase founded in commercial integrity, so that you shall not be deprived of your newly-acquired possessions, *even though* AN ACT *of bankruptcy had previously been committed* by your vendor, but of which, when you bought, you were ignorant: I therefore make the enactment above quoted."

This manner of reading the intention of the clause, appears to me likewise to be in accordance with the principle which recognizes the period of the retrospective right of assignees to a bankrupt's property. From what time does this retrospective right operate? Why only from the *act of bankruptcy* certainly, at which moment the law transfers a man's property from himself to his creditors; but prior to the committing this act, it permits his property to remain in him, together with all its attributes—one of which is the *right of alienation*. From an attentive perusal of the enactment, therefore, as well as a regard to the principle of law which it involves, I shall be glad to have the opinions of others, whether I am not correct in this conclusion, namely, that if a *bonâ fide* conveyance be executed by a trader to-day, an act of bankruptcy be committed by him to-morrow, and a commission issue immediately thereupon, the conveyance IS GOOD (as I allege it is) against his assignees.

E. S.

REMARKABLE TRIALS.

No. XII.

COLE'S CASE FOR THE MURDER OF DR. CLENCHE.

[We have selected and abridged this case, as illustrating the mode of trial at the Old Bailey in 1692. It will be observed that the Judge before whom it was tried, literally acted (with equal humanity and acuteness) as counsel for the prisoner. The mode of examination, however, more resembles a scene at a modern Police-office than a trial before one of the Judges of the Land.]

Clerk of Arraignments.—Set Mary Milward up.

Mr. Justice *Dolben.*—What have you to say, woman, against Cole the prisoner, concerning the murder of Dr. Clenche?

Mrs. *Milward.*—My Lord, my husband declared to me, that he and Mr. Cole were in the coach with Dr. Clenche, and that they two killed Dr. Clenche.

Mr. Justice *Dolben.*—That's no evidence at all, what your husband told you; that won't be good evidence, if you don't know somewhat of your own knowledge.

Milward.—My Lord, I have a great deal more that my husband told me to declare.

Mr. Justice *Dolben.*—That won't do; what if your husband had told you that *I* killed Dr. Clenche, what then? that will stand for no evidence in law. We ought by the law to have no man called in question, but upon very good grounds, and good evidence, upon oath, and that upon the verdict of twelve good men. Have you any body that can prove any thing against Cole, or does it all arise barely from your husband's report?

Milward.—My husband declared that he and Mr. Cole were to go under a pretence to rob the doctor, and so take their opportunity to kill him; and the first time they called at Dr. Clenche's he was not within, but the second time they went he was within, and then they did the murder.

Mr. Justice *Powel.*—When died your husband, mistress?

Milward.—The 23d of May last, Sir.

Mr. Justice *Dolben.*—Here hath been two or three sessions since that time, why did not you take up Cole about it before now?

Milward.—I did not know where to find him.

Mr. Justice *Dolben.*—Why, then you should have gone to a magistrate, and told him of it, and taken some advice about it.

Milward.—I did, as soon as I had found Mr. Cole.

Mr. Justice *Dolben.*—Your business had been to have discovered this to Mrs. Clenche, and she should have looked after Cole.

After some further cross-examination of the witness Milward, John Gamble, the coachman, was called.

Mr. Justice *Dolben.*—You, coachman, do you know the prisoner?

Gamble.—No, my Lord, I do not know him.

Mr. Justice *Dolben.*—Look upon him, do you know him or no?

Gamble.—No truly, my Lord, I do not know him.

Mr. Justice *Dolben.*—Why, look you, woman, he does not know him! You, coachman, the story is well known; therefore I ask you again, upon your oath, if that the prisoner at the bar be one of the three persons that you carried to the Blue Boar's Head on the back side of St. Clement's, that night Dr. Clenche was murdered?

Gamble.—Indeed, my Lord, I cannot be positive whether he be one of them or no: I took up, in Cheapside, three men into my coach, and set one of them down at Gray's Inn, and drove the other two to Dr. Clenche's house, that night he was murdered, and he was not at home; and afterwards the man I had set down came in again, and I set them all down at the Blue Boar's Head alehouse, near Clement's Inn Gate, about eight o'clock at night.

Clerk of Arraignments.—Set up William Brown, servant at the Blue Boar's Head.

Mr. Justice *Dolben.*—Hark you, is this one of the three men that the coachman set down at your master's house, that night Dr. Clenche was murdered?

William Brown.—Yes, my Lord, it is.

Mr. Justice *Dolben.*—What time did they come to your house?

William Brown.—They came about eight o'clock at night, and this man and the other stayed till after eleven o'clock. Only Milward went out, and returned presently; and then immediately he went out again, which was before nine o'clock, and returned not until eleven o'clock after.

Mr. Justice *Dolben.*—What time was Dr. Clenche killed?

William Brown.—About ten of the clock, or betwixt ten and eleven, as I think.

Mr. Justice *Dolben.*—Who went out first, only Milward?

William Brown.—Only Mr. Milward, my Lord: but this man stayed all the time, till eleven o'clock at night; and another, who went by the name of Harper, as I am since informed.

Mr. Justice *Dolben.*—Why then, this man could not be in the coach when Dr. Clenche was murdered, so Harrison and Milward killed the doctor in all probability; for he says, this man at the bar, and another, stayed at his master's house till after eleven o'clock.

William Brown.—My Lord, when Milward came back, he brought a couple of men with him, in soldiers habit, about eleven o'clock at night.

Mrs. *Milward.*—My husband told me, that Mr. Cole and he went out of the house, and left Mr. Harper behind.

Mr. Justice *Dolben.*—But this man swears that the prisoner did not go out of the house till eleven o'clock at night, and they were set down about eight of the clock, and Dr. Clenche was found killed a little after ten at night; and that Milward went out, and then came in again about eleven o'clock, and brought two men with him: 'tis to be feared he had been killing Dr. Clenche in that time. Have you any more to say? If this man says true, nothing can be said more. What say you more?

William Brown.—My Lord, Mr. Milward being at my master's house that night Dr. Clenche was killed, desired to make a fire in the same room the next morning, and that he would come again then; and I made a fire accordingly, but he came not then, nor afterwards at any time to my knowledge; but on a Sunday night about a fortnight after, came the two persons that came with Mr. Milward in the coach to my master's house that night Dr. Clenche was murdered, and my master being above stairs, I sent him word, that the two men were there who were there that night that the doctor was murdered, and they enquired for Mr. Milward, saying he promised to meet them there, and he not being there, before my master could come down, they paid for the pot of drink, and went away.

Mr. Justice *Dolben.*—When they came together to the Blue Boar's Head, they had some evil design no doubt, but if it be true that those two men staid from eight o'clock till eleven, then it could not be this man that murdered Dr. Clenche; but hark ye, fellow, you say there were three persons, whereof Cole was one, and Milward the other, who was the third?

William Brown.—I do not know his name, my Lord, otherwise than as I have since heard.

Milward.—The other man's name was Harper.

Mr. Justice *Dolben.*—You know nothing but what your husband told you, and 'tis most probable that Harrison and he did the murder, for that it appears that the prisoner at the bar is not the man that killed the doctor, that's plain. Have you any more?

Milward.—About a fortnight after the murder was done, they came to enquire for my husband at the Blue Boar's Head, and whilst the tapster went to tell his master, they left their money for the drink and went away, and would not be seen.

Mr. Justice *Dolben.*—What if they had run away, what then? If they were at the Blue

Boar when Dr. Clenche was killed, they could not kill him.

Milward.—His master says, that they were in the house, and out of the house, very often. Call Mr. Dalley, the master (who appeared, and stood up).

Mr. *Dalley.*—My Lord, two of them were not out of the house all the night, I am not positive that this is the man that came in with Milward, but those two men that came in with him, never went out at all until after eleven o'clock at night, but only Milward went out between eight and nine, and returned about eleven o'clock.

Mr. Justice *Dolben.*—What do you say to this, woman? Your husband told you that the prisoner was one of the two, this witness cannot say he was one, but says positively those two men never went out till eleven o'clock, and from St. Clements Danes to Leadenhall Street is not to go in and out, they must take a great deal of time to go thither and back again. Hark you, Mr. Dalley, you say that those two men that Milward left, never went out of your house till after eleven o'clock; you are sure on't?

Dalley.—No, my Lord, they did not go out.

Mr. *Wise.*—Mrs. Milward hath two witnesses that can tell somewhat more of the matter concerning her husband's being concerned in the murder.

Milward.—My husband told me, that the coachman took them up not far from Chancery Lane end, and that Mr. Cole laid hands upon the doctor in the middle of Holbourn.

Clerk of Arraignments.—Cryer, call John Sikes, the coachman.

Mr. *Sikes.*—My Lord, I took up two men in Fleet Street, about Fetter Lane end.

Mr. Justice *Dolben.*—What manner of men were they? What cloaths had they on?

Sikes.—My Lord, one of them had a light-coloured perriwig on, and the other was in sad coloured cloaths, and lank hair, but I cannot be positive that this is one of them. They asked me if I knew Dr. Clenche of Brownlow Street? I told them, that I did not know the doctor, but I knew the street; and they bid me drive thither; and when I came to the street's end they sent me to the doctor's house, and bid me tell him that two gentlemen were at the street's end in a coach, who desired him to go with them to one that was not well; so the doctor came presently after me, and when he was in the coach, they bid me drive to Leadenhall Street; and when I came about Holbourn Bars they bid me drive faster; and when I came to Leadenhall Market, they bid me drive to Aldgate, and I drove through the gate to the Pye Tavern, and when I had turned my coach, they bid me ask for one Hunt a chyrurgeon, but he was not there; and then I told them the gate was shut, and one of them put his hand out of the coach and gave the watchman sixpence to open the gate, and then I drove back again to Leadenhall Market, and there they bid me stop again, and one of them gave me half-a-crown to buy a fowl, and I went a little way from the coach, and one of them called me back again and gave me a shilling more, and bid me bring a couple; and he bid me ask for one Hunt a poulterer; I went all over the market, but I could find no such man, so at length I bought the fowls of another man, and would have had the man gone with me to my coach, but he would not; then I came to my coach-side, and found the door open, and I found the doctor sitting at the bottom of the coach, with his head against the cushion, and the two men gone, and one of them seemed to be in drink when I took them up, and I thought him to be that man fallen asleep, and that the doctor and the sober man were gone to the person that was not well; so then I called the watch, and found the doctor dead, and then it was about half an hour after ten o'clock at night.

Mr. Justice *Dolben.*—Then I ask you, was that one of the men?

Sikes.—I cannot say it, my Lord; I don't know him.

Mr. Justice *Dolben.*—What time of night was it that you took them up at Fetter Lane end?

Sikes.—It was about nine o'clock, somewhat after.

Mr. Justice *Dolben.*—Why then, they say, that this man never stirred out of the house from eight o'clock till eleven; this man can't be concerned.

Mr. Justice *Dolben.*—You hear what is said against you; what do you say to it, Mr. Cole?

Cole.—My Lord, I know nothing of it.

Mr. Justice *Dolben.*—No, I doubt you do, you were one of the three that was set down on the back side of St. Clement's Church, at the Blue Boar's Head, where all things were consulted.

Cole.—My Lord, there was not one word spoke about killing of Dr. Clenche in my company.

Mr. Justice *Dolben.*—Were not you acquainted with Milward?

Cole.—Yes, my Lord.

Mr. Justice *Dolben.*—Were you not with Harrison?

Cole.—No, my Lord, I never saw him with my eyes.

Mr. Justice *Dolben.*—Gentlemen of the Jury, Cole, the prisoner at the bar, stands indicted for murdering Dr. Clenche, who, as it now appears, was murdered in a coach by two persons that were therein together with the doctor. The question now before you is, whether Cole was one of these two? Gamble, the coachman, swears, that the night Dr. Clenche was killed, he took up three men in Cheapside, set one of them down at Gray's Inn, and drove on to Dr. Clenche's house; the doctor was not at home, then the third man came in again to the coach, and he drove to the Blue Boar's Head, an alehouse by Clement's Inn, and set those three men down there, and 'twas then about eight of the clock. Sikes, the coachman, swears, he took up two men at Fetter Lane end in Fleet Street, and by their directions drove to Brownlow Street, where the doctor lived, whom they got into the coach, and he

drove as far as Aldgate, and through the gate, and then came back to Leadenhall; was sent by the two men in the coach to buy a fowl; when he returned they were gone, but the doctor found dead in the coach; and 'twas now half an hour past ten. The question now, as I said before, is, whether Cole, the prisoner at the bar, was one of these two men? The woman tells you, Milward her husband told her, that he and Cole were in the coach with Dr. Clenche, and that they two killed Dr. Clenche. She likewise tells you, her husband told her, that Cole and her husband went out from the Blue Boar's Head near Clement's Inn, and left only Harper behind. The Court hath already declared to you, that her evidence, being only what her husband told her, is no evidence in law to take away a man's life, especially when it is single, without any circumstance to confirm it, as here 'tis. But that is not all, there is a very great evidence, that what she says her husband told her, is false. He told her, she says, that he and Cole went from the Blue Boar's Head and killed the doctor, leaving only Harper behind. The master of the house and his servant (witnesses which she produceth), both swear, that her husband went out alone, and left two men behind, who both staid in the house till Milward returned, which was about eleven of the clock. The master, 'tis true, cannot say that Cole is one of the two, but the servant is very positive he is, and both are positive that two men that Milward left behind continued in the house till Milward returned at eleven of the clock. These two men's depositions do plainly contradict her story, and if they swear true, Cole, the prisoner, was not one of the persons that killed the doctor. You have all heard, I am sure, that one Harrison hath been convicted by a jury in this place for the murder of Dr. Clenche. If he was one of the two, then Milward, by his own confession (if his wife swear true), was the other; but this you cannot take notice of, the record is not produced, neither hath the prisoner taken notice of it. The question is only, whether Cole be guilty of the murder? which I leave to you upon the evidence you have heard.

The Jury found the prisoner—*Not Guilty.*

CHANCERY SINECURES.

In another part of this Number will be found the Ninth Letter of our able contributor, "A Barrister." This we readily insert, as we should any thing from the same writer, with the feeling that all the actions and conduct of the eminent person holding the Great Seal should be subject to the severest scrutiny. Care must be taken, that no one man in office, in a free state, becomes too powerful; nay, as we think, too popular. Far be it from us, however, to deny the Lord Chancellor the fair share of praise to which he is in common justice entitled. In the first place, within these few days he has consented to place the mode of remunerating his office on the proper footing—he is now paid by a salary, and not by fees; and by a salary which we cannot think too high for the first law officer of this country. Secondly, by the bill which he has just brought in, and which will probably pass into a law before the close of the session, he intends to abolish six or seven legal sinecure offices, which now burden the profession and the public. We have too often raised our voice against this part of our present system, not to concur most heartily in this measure, and rejoice in its promised success. And thirdly, a bill has been brought into the House of Commons, with his Lordship's sanction, which will clear away nearly all the rest of these useless incumbrances.

We had written thus far, when the newspaper, containing the Lord Chancellor's feeling and considerate notice of his former speech, was brought before us. We are happy that his Lordship has taken the humble advice which we ventured to give him in our last number, and to declare that he has now said all that can possibly be required of him.

THE THIRD REPORT OF THE REAL PROPERTY COMMISSIONERS.

The third Report of the Real Property Commissioners has been for some time in our possession. It will form the subject of several articles; and we shall lay the whole before our readers *verbatim*, as soon as possible. Its contents are of great importance to the profession. The subjects are, 1. The Law of Tenures, and the propriety of abolishing them; 2. The Law of Contingent Remainders, Springing and Shifting Uses, Executory Devises, Bequests, and Perpetuities; 3. The Law of Covenants; and, 4, The Doctrines of Limitation to the Rights of the Church,—which involves the consideration of moduses, compositions real, and other similar matters, as to which the bishops have been interrogated. We shall simplify and abridge all these subjects in future numbers: we have at present only room for this short notice.

SUPERIOR COURTS.

KING'S BENCH.—PRACTICE COURT.

BAIL.—COSTS OF JUSTIFICATION.

If time to justify be granted, the defendant must pay the plaintiff's costs of attending to oppose, before others justify.

If the copy of the affidavit of sufficiency, served on the plaintiff, does not purport to be a copy, or it does not state the names of the parties and the sums in the actions in which he is already bail, or the names of the occupants and numbers of the houses stated by the bail to be in their possession, those defects are not grounds for rejecting the bail, but for disallowing the defendant his costs of opposition.

Jeremy applied for time to justify bail, some accident having prevented the attendance of the bail of whom notice had been given, and who had made the affidavit required by the third rule of T. T. 1 W. 4.

Taunton, J. allowed time.

Dowling then applied for the costs of attending to oppose the bail.

Taunton, J.—Those costs must be paid before the bail justify.

Some days after, the same bail appeared to justify.

Dowling then opposed them, on the ground that the defendant had not complied with the third rule of Trinity Term of 1 W. 4. The copy of the affidavit of sufficiency, with which the plaintiff had been served, did not purport, by anything which appeared on it, to be a copy of the original affidavit sworn by the bail. He cited *West* v. *Williams*[a] in support of his opposition. Secondly, the bail described themselves as being bail for other persons, but did not state the names of the actions nor the amounts of debts in and for which they had become security, as required by the form subjoined to the above rule. Thirdly, the bail stated themselves to be possessed of certain houses, but they did not, as required by the same form, state the numbers and occupants of those houses.

Taunton, J.—Those are not sufficient objections to authorize the rejection of the bail; but if the bail should pass, they will deprive the defendant of the costs of justification.

Time was given to the plaintiff to inquire into the circumstances of the bail, and they were finally rejected.

Taunton, J. then allowed the costs of both the latter attendances of the plaintiff to oppose the bail.

Bail rejected.—*De Bode's* bail. E. T. May 3d, 1832. K. B. P. C.

JUDGMENT ON OLD WARRANT OF ATTORNEY.

A letter dated within the term, from a defendant, is sufficient proof that he is alive, so as to authorize judgment on an old warrant of attorney being entered up.

Wightman moved for judgment, on an old warrant of attorney, on the affidavit of a party, who stated that he had received a letter dated within the term, in the hand writing of the defendant. The letter was exhibited.

Taunton, J.—That will do.

Rule granted.—*Anonymous.* E. T. April 30th, 1832. K. B. P. C.

EXECUTORS.—SECURITY FOR COSTS.

The Court will compel a plaintiff executrix, who is out of the jurisdiction, to give security for costs; but such security will be confined to those costs only for which she can be liable.

Talfourd shewed cause against a rule requiring the plaintiff to give security for costs, she being abroad. The plaintiff is an executrix, and therefore not liable to pay costs. She might be liable to costs in case of a discontinuance, but not so if a verdict passed against her. It would, therefore, be useless to require the plaintiff to give security for costs for which she would not be liable. The Common Pleas, in the case of *Chevalier and others, Executors of Fox* v. *Finnis*[a], have decided, that plaintiffs who live out of the jurisdiction of the Court may be compelled to give security for costs, though such plaintiffs sue as executors. Were it not for that case the Court would not interfere.

Taunton, J.—I think, that as the Court of Common Pleas has so decided, I must be governed by its decision; for it appears to me to be good sense. The plaintiff, though an executrix, is not freed from her liability for costs in all cases. If she should discontinue, she would be liable for costs. The security will, of course, be confined to such acts as she would be liable to in point of law.

Rule absolute.—*Chamberlain, executrix of Thomas*, v. *Chamberlain.* E. T. April 30th, 1832. K. B. P. C.

DEMAND OF DECLARATION.—TIME TO DECLARE.

If a demand of declaration has been served, and time to declare is obtained, the defendant may sign judgment of non pros. *without a fresh demand of declaration.*

V. Richards applied for a rule *nisi* to set aside a judgment of *non pros.* for irregularity. The defendant had ruled the plaintiff to declare, and served a demand of declaration. The plaintiff obtained two rules for time to declare, the latter of which expired on the first day of the present term. The plaintiff not having declared on that day, the defendant signed judgment of *non pros.* without another demand of declaration. That, I apprehend, is irregu-

[a] 1 Dowling's Practice Reports, 162.

[a] 1 Brod. & Bing. 277.

lar. He should have made a second demand of declaration.

Taunton, J.—If there has been once a demand of declaration, that is sufficient. When you obtain time to declare, you remain in the same situation when it has expired as you were when you obtained it.

Rule refused.—*Wells* v. *Hare*, E. T. 30th April, 1832. K. B. P. C.

APPRENTICESHIP.—SETTLEMENT.

If the whole consideration is not stated in an indenture of apprenticeship, it is void under 8 *Ann. c.* 9. § 39, *although on a stamp of the full amount.*

The consideration set out in the indenture of apprenticeship, under which a settlement was claimed, was 4*l.*, which was paid by the trustees of a society for putting out apprentices. Previous to the execution, the pauper's mother, who was a party to the indenture, agreed to give the master 1*l.* more, which she afterwards paid; the stamp on the indenture was sufficient to cover the largest sum; the question was, whether by the 8th of Ann. c. 9, § 39. this indenture was void, on the ground that the full sum was not truly inserted.

Milner, in support of the order of sessions, contended that it was void.

Starkie and Sir *G. Lewin*, *contra*. In the case of *Rex* v. *Bourton upon Dunmore*, the mother was incapable of making a binding contract, as she was a married woman; here it does not appear that the pauper's mother was a married woman. The master could not have brought an action for this additional sum, if it had not been paid to him. As the revenue was not defrauded, it was not necessary to set out the full sum; *vide Rex* v. *Cadoy*, 1 B. & A. 476, judgment of *Bayley*, J.

Per Curiam.—The object of the legislature was to provide that the whole of the consideration should be inserted in indentures of apprenticeship. We cannot assume the pauper's mother was a married woman; she must be considered as a feme sole; her contract was therefore valid, and the indenture is void.—*Rex* v. *Inhabitants of Baildon*. K. B. Wednesday, April 25th, 1832.

STOLEN BILL OF EXCHANGE.—SECONDARY EVIDENCE.

Where a bill of exchange has been stolen, the Court will grant a rule to refer it to the Master to compute principal and interest, notwithstanding the loss of the bill.

On an application to refer a cause to the Master, to compute principal and interest on a bill of exchange, without executing a writ of inquiry, it appeared that the bill had been stolen from the plaintiff's attorney's office, and therefore could not be produced. The case of *Brown and others* v. *Messiter* [a], was cited. There the Court referred it to the Master to see what was due for principal and interest upon a bill of exchange, on the production of a copy of the bill, verified by affidavit of the plaintiff's attorney, the original having been stolen out of his pocket, and no tidings of it gained.

Taunton, J. granted the rule.

Rule *nisi* granted.—*Allen* v. *Miller*. May 12th, 1832. K. B. P. C.

[a] 3 M. & S. 281.

NOTES OF THE WEEK.

House of Lords.

FINES AND RECOVERIES.— LIMITATION OF ACTIONS.—INHERITANCE.—CURTESY.

These Real Property Bills still appear in the list, "waiting for second reading."

SENTENCE OF DEATH.

Still waiting for the report of the Committee.

SHERIFFS' EXPENSES.—FORGERY.

Waiting for the second reading.

SEWERS.

This Bill has been agreed to, without amendment.

CHANCERY OFFICES ABOLISHING.

This Bill has passed the House.

CONTEMPTS IN ECCLESIASTICAL COURTS.

Returned from the Commons, and agreed to.

BILLS OF EXCHANGE.

Agreed to without amendment.

House of Commons.

LORD CHANCELLOR'S BILL.

Considered in Committee, and waiting for report.

CHANCERY SINECURES.

Read a second time, and in Committee.

EXCHEQUER COURT OFFICERS.

Waiting for Report.

ECCLESIASTICAL COURTS CONTEMPTS.

Read a third time and passed.

TITHES PRESCRIPTION.

Lords' amendment to amendment agreed to.

PAROCHIAL REGISTRATION.

Mr. *Wilks* has given notice for the next session, of a motion for a select committee, to consider the general state of Parochial Registries, and the Laws relating to those Registries, and the Registration of Births, Baptisms, Marriages, Deaths, and Burials in England and Wales.

BUILDINGS AND PARTY WALLS.

Mr. *Hughes Hughes* has renewed his notice of motion for Regulating Buildings and Party Walls, and Preventing Mischiefs by Fire.

ANSWERS TO QUERIES.

LAW OF LANDLORD AND TENANT.

FRAUDULENT REMOVAL.—SUB-TENANT.
P. 192, *ante*.

I think the case stated by J. B. does not come under the operation of the 4th section of the statute mentioned by him. In *Thornton* v. *Adams*, 5 M. & S. 38, that statute was held not to extend to the removal of goods by an undertenant, to avoid a distress by the landlord on his immediate tenant; and that it was incumbent on the landlord to prove that the goods were the property of his tenant, and not of the sub-tenant, which appears to be the fact in this case. Also see Chitty's Statutes, p. 669, where it is said, the statute applies to all cases where by the removal of the goods the landlord is driven to the barren right of an action, which I presume is not the case here.

I.

LAW OF PROPERTY AND CONVEYANCING.

PERSONAL PROPERTY.—DESCENT.
P. 223, *ante*.

1. The testator's property will of course be divided according to the directions contained in his will; following which, I consider that the testator's grandchildren (in the absence of any clause to the contrary) acquire vested interests under his will, immediately on the death of their mother; and that the respective shares will become payable on the death of their grandmother.

J.

2. In answer to the query of H. B. A., I think it is quite clear, as the daughter died in the life-time of her mother, and in consequence never became possessed of her interest under the will, that the children will upon their grandmother's death, be entitled to equal shares.

J. A.

COMMON LAW.

TENANTS IN COMMON.—ELECTIVE FRANCHISE. P. 224, *ante*.

I presume by *A.*'s devise the children of *B.* and *C.* have the *fee simple*, as tenants in common. Assuming this, and considering the interests of tenants in common as separate and independent (2 Com. c. 12; Litt. § 293), if their freehold gives, on division, the yearly value of 40*s.* above all charges, to *each* tenant in common, then I consider *each* of them (or the husbands of such as are daughters and married and no settlement made,) entitled to a vote under the new act; otherwise not. The lessees, if the premises comprised in *each* lease are of the yearly value of 50*l.* above all charges, are also entitled to a vote, *each in respect of his lease*. See 2 W. 4. c. 45. §§ 20 and 75.

J.

QUERIES.

COMMON LAW.

APPRENTICE'S INDENTURES.

Is the duty of six shillings and one shilling in the pound, directed by the statute of the 8 Ann, c. 9, to be paid on the above indentures, still payable?

G. G.

LAW OF LANDLORD AND TENANT.

BANKRUPT LESSEE.

A tenant, holding premises under lease, became bankrupt, having previously assigned or underlet to another, who was in possession at the time of the bankruptcy. The assignees declined to accept the lease, and the bankrupt in due time delivered it up to his lessor, but did nothing towards *giving up possession* of the demised premises, which continue to be occupied by the party let in by him. The lessor has not at any time done any act to acknowledge such occupier to be his tenant. What is the landlord's remedy, to obtain possession, and to recover for rent due and dilapidations, or other breaches of covenant, committed *since* the bankruptcy?

X. D.

WITNESS.—BILL OF EXCHANGE.

In an action by the indorsee of a bill of exchange against the acceptor, can the plaintiff (the indorsee) subpœna and examine the drawer of the bill, to prove the acceptor's hand writing? J. S.

ATTESTATION OF WILLS.

Where does your correspondent T. P. (L. O. Vol. 4. p. 187) discover, that money in the funds must be devised by will in writing, attested by *two* witnesses? N. F.

[33 G. 3. c. 28. § 14; and 35 G. 3. c. 14. § 6. Ed.]

LAW OF PROPERTY AND CONVEYANCING.

BANKRUPTCY.—CONVEYANCE.

A., a trader within the meaning of the bankrupt law, besides his household furniture and stock in trade, was possessed of leasehold and freehold property, of the whole of which leasehold and freehold property, on the 24th June, he executed a conveyance to *B.*, for a *bonâ fide* consideration, which passed at the time the conveyance was executed. The day after the conveyance was executed, *A.* committed an act of bankruptcy. On the 26th, a commission issued against him, and he was declared bankrupt. Can the assignees of *A.* maintain trover against *B.* for the property so conveyed? *B.* has no connexion whatever with the commission, although at the time the conveyance was executed, *B.* had full knowledge of *A.*'s insolvency. It must be borne in mind, that although insolvent, *A.* had not committed any act of bankruptcy, either open or secret, when he executed the conveyance to *B.* W. S.

GAME LAWS.

GAME CERTIFICATE.

Is a game certificate void, if taken out at a different place from the one in which the party taking it usually resides, and which describes him as of a different place from his usual residence? I.

LAW OF ATTORNEYS.

ATTORNEY'S LETTER.—TENDER.

After an attorney has written a letter for payment of a debt due to his client, is the attorney or his client bound to receive the amount of the debt, if tendered without the attorney's charge for writing the letter? that is, is the tender of the debt alone, without the 3*s.* 6*d.* for the letter, a legal tender? And, if not, suppose the attorney has written several letters, and given attendances, can any thing beyond the 3*s.* 6*d.* be legally demanded, on tender of the debt, with 3*s.* 6*d.* costs? A. A.

RECOVERING COSTS.

If an attorney *in the country* is only admitted in the *King's Bench*, can he legally carry on an action in the Common Pleas, or a suit in Chancery, through an agent in London, who is duly admitted in the Common Pleas, and a solicitor in Chancery? and can he, in an action for costs incurred in such Court (of which he is not admitted), recover the amount? A. A.

PRACTICE.

NEW RULES.—LIBEL.

By the new Rules lately passed, it is ordered, that an indorsement be put upon all the writs, stating the amount of the debt and costs. In an action for a libel, what should be stated? J.

FEES AT THE ACCOUNTANT GENERAL'S OFFICE.

Having lately been called upon by one of the clerks of the accountant general, for a gratuity on distributing a small fund, I shall be obliged by any of your correspondents informing me whether I am obliged to pay it, and how long it has been customary to give such fees; I never having paid any before in the late accountant general's time. J.

NEW PROCESS ACT.—NOTICE TO WRITS.

By the new Uniformity of Process Act, the writ of summons is in substance to be nearly the same as the English notice at present written under the copy of every serviceable process: such a notice therefore henceforth will be of no *practical* utility: but must not the English notice nevertheless be written under such writ of summons; for the acts 12 Geo. 1. c. 29, 5 Geo. 2. c. 27, and 21 Geo. 2. c. 3, are not repealed, and they unitedly require that in all cases where the plaintiff does not proceed to arrest defendant, he "shall serve him or them personally within the jurisdiction of the Court with a copy of the *process*, upon which shall be written an English notice to each defendant, of the intent and meaning of such service." Now the writ of summons is the process substituted for the former process of the several Courts; and though it plainly expresses its own meaning, still I think an English notice of the meaning of such service will, as formerly, have to be written upon the copy served. Am I right or wrong? T. T.

MISCELLANEA.

A NEW LAW AUTHORITY.

In the last number of Mr. Bingham's Reports, a new authority is cited, in an argument in Banc. *Spankie* and *Storks*, serjeants, after quoting *Trelawney* v. *Coleman*, 6 B. & Ald. 90, and *Edwards* v. *Crock*, 4 Esp. 39, then observe, "Voltaire, no mean authority for the springs of human action, describes," &c.; and the reporter has obligingly added the correct reference, "*Le monde comme il va. Vision de Babouc* circa finem." *Willis* v. *Bernard*, 8 Bing. 381.

The Legal Observer.

VOL. IV. SATURDAY, AUGUST 18, 1832. No. XCVI.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

CHANGES IN THE LAW DURING THE PRESENT SESSION OF PARLIAMENT, 1831—1832.

No. III.

CHARITIES.

SOME alterations have been made respecting charity estates by 2 W. 4, c. 57. By § 3 it is enacted, that where any person in whom any lands shall be vested in trust for any charity, shall be dead, the Courts of Chancery or Exchequer may, on the petition of the Attorney-General, or of the persons administering the charity, direct the Master to take the usual steps for finding the representative of such person; and if no such representatives shall be found, then the Master may appoint new trustees for the charity; and the trust property shall be conveyed to the new trustees by any person whom the Courts may appoint for that purpose. By § 4, resident ministers and churchwardens are empowered to receive rent-charges belonging to charities, where there are no existing trustees.

THE EQUITY CONTEMPT ACT.

BY the 1 W. 4. c. 36, it was enacted, that the discharge of any prisoner under the Insolvent Debtors' Act (7 G. 4. c. 57) shall extend to all process issuing from any court of equity for contempt in non-payment of money, and to costs incurred by creditors in any such court, and to all costs which the prisoner shall be liable to pay in consequence of such contempt; but this act did not extend to commitments for any other contempts. By the 2 W. 4, c. 58, it is enacted that in all cases of contempt, other than and besides those provided for by the last-mentioned act, where any person or persons are or is, or shall at any time hereafter be, in prison under or by reason of any commitment or attachment, directed by or issued out of the Court of Chancery or his Majesty's Court of Exchequer, the court of equity out of which such commitment shall have been directed, or out of which such attachment shall have issued, shall (upon the application of the persons or person against whom such commitment or attachment hath been directed or issued) have the power, if it shall so think fit, to discharge such persons or person from their, his, or her contempt, except as to the costs thereof, for which costs they, he, or she shall remain in custody; and such costs shall be deemed of the said herein-before recited provisions of the said last-mentioned act, and they, he, or she shall be discharged therefrom, and from the process of contempt, in like manner as is in the said last-mentioned act provided for in cases of process of contempt for non-payment of money or costs; provided that this act shall not weaken any of the powers by the said act passed in the first year of his present Majesty given, and that nothing therein contained shall lessen the operations of the said act for the Relief of Insolvent Debtors.

NEW BILLS IN PARLIAMENT.

ANALYSIS OF A BILL FOR MAKING PROVISION FOR THE LORD HIGH CHANCELLOR OF ENGLAND, IN LIEU OF FEES HERETOFORE RECEIVED BY HIM.

(*Concluded from p.* 230.)

That it shall and may be lawful for the Lord Chancellor, by any order or orders of the said Court for that purpose, from time to time to order and direct, that the money so paid in to the said account of fees formerly payable to the Lord Chancellor, be from time to time invested in the purchase of parliamentary or government securities, to be placed to the same account, or to be transferred to or laid out and invested in the said account, intituled, "Account of securities purchased with surplus interest arising from securities carried to an account of monies placed out for the benefit and better security of the suitors of the High Court of Chancery."

And reciting that certain salaries, perquisites and allowances have been heretofore payable by His Majesty's letters patent to the Lord High Chancellor, and charged upon the office of the Keeper or Clerk of His Majesty's Hanaper in Chancery, and the said Keeper or Clerk of the Hanaper has been accustomed to collect and receive certain fees for the use of the Lord Chancellor for the time being, but which salaries, perquisites, allowances and fees it is desirable should cease to be payable from the 5th day of January last: and reciting that by the provisions of a certain act of parliament, passed in the second year of the reign of his present Majesty, intituled, "An act to establish a Court in Bankruptcy," it is enacted, certain compensation shall be made to the Clerk of the Hanaper and other officers of the Lord Chancellor and of the High Court of Chancery, for their loss of fees under the operation of the said act, and that it shall be lawful for the Lords Commissioners of His Majesty's Treasury to ascertain the amount of the lawful fees and emoluments of the said officers, and to award an annuity or annuities of such an amount and for such term as the Lords of the Treasury shall find to be a fair and reasonable compensation for the loss to be sustained by all or any of the officers aforesaid by the abolition of the said fees: and reciting that the said Commissioners of the Treasury have by certificate under the hands of , bearing date the day of , certified, that an annuity of the amount of ought to be paid to the Six Clerk Comptroller of the Hanaper for the time being; that an annuity of ought to be paid to the Sealer attending the Great Seal for the time being; that an annuity of ought to be paid to the officer called the Chaff Wax, for the time being; that an annuity of ought to be paid to the Examiner of Letters Patent for the time being; and that an annuity of ought to be paid to the said Keeper or Clerk of the Hanaper for the time being, as a composition for the loss sustained by them by the abolition of the said fees: and reciting that the said several officers have heretofore received and retained their fees out of the public monies heretofore passing through the hands of the said Keeper or Clerk of His Majesty's Hanaper;

It is proposed to be enacted, that from and out of the public monies passing through the hands of the Keeper or Clerk of His Majesty's Hanaper in Chancery, and from and out of the same fund as the said allowances to the Lord Chancellor have heretofore (subject to certain deductions) been paid to the said Lord Chancellor for the time being, the following annuities shall be made payable; (that is to say) to the Six Clerk Comptroller of the Hanaper for the time being, an annuity of ; to the Sealer attending the Great Seal for the time being, an annuity of ; to the officer called the Chaff Wax for the time being, an annuity of ; to the Examiner of Letters Patent for the time being, an annuity of ; and to the said Keeper or Clerk of the Hanaper for the time being, an annuity of ; the said several annuities being all granted to the said officers as a compensation for their loss of fees under the operation of the said recited act of the second year of the reign of his present Majesty.

That the said annuities shall respectively commence and become due from the 5th day of January last, and shall be paid and payable by equal half-yearly payments; and that if any or either of the officers or persons to whom the said annuities, or either of them, shall be due or payable for the time being, shall resign or die, such officer or person so resigning, and the executor or administrator of such officer or person so dying, shall be entitled to receive and shall be paid such proportionable part of their respective annuities as shall have accrued during the time that such person or persons shall have executed such respective office since the last half-yearly payment, and that the person or persons succeeding to such office or officer shall be entitled to receive such proportionate part of their said respective annuities as shall accrue from the death or resignation of the person or persons so dying or resigning.

That the several and respective receipt and receipts of the said several and respective officers, their executors or administrators, shall be a good and sufficient acquittance and discharge to the Keeper or Clerk of His Majesty's Hanaper in Chancery for the time being for the payment of the said several and respective annuities, and shall be taken, acknowledged and received as such by the commissioners for auditing public accounts.

That the salaries, perquisites, allowances, and fees heretofore payable as aforesaid by the said Keeper or Clerk of the Hanaper to the Lord Chancellor, shall, with such deductions as have been heretofore made therefrom, cease to be payable to the Lord Chancellor as from the 5th day of January 1832, and that the same from and after that day shall be paid to or retained by the said Keeper or Clerk of the

Hanaper for the time being, and shall be appropriated in the same manner as all public monies, received in the said office in discharge of the various claims thereupon, the said Keeper or Clerk debiting himself in his public accounts with the receipt of the said fees.

That out of the interest arising from monies placed out for the benefit and better security of the suitors of the High Court of Chancery, and interest arising from securities purchased, with surplus interest arising from securities carried to an account of monies placed out for the benefit and better security of the suitors of the High Court of Chancery, the costs and charges incurred in procuring and passing this act, and of all proceedings had or to be had in pursuance thereof, or under the same, shall be paid by the governor and company of the Bank of England, by virtue of an order or orders of the High Court of Chancery to be made for that purpose, but subject and without prejudice to the payment of all salaries and other sums of money, which by the several acts hereinbefore mentioned or referred to, or any other act heretofore made, are directed and authorized to be paid thereout.

That the powers and authorities given in this act to the Lord High Chancellor shall and may be exercised in like manner, and are hereby given to the Lord Chancellor.

PRACTICAL POINTS OF GENERAL INTEREST.

No. XXVIII.

BONA NOTABILIA.

The law on the subject of *bona notabilia* has lately been stated by a very competent authority—the Ecclesiastical Commissioners. They say in their report, that "in all cases where probate or administration is taken out in any court within the province of Canterbury, (except from the Prerogative Court, or perhaps a royal peculiar, and in some cases other peculiars), if it should afterwards appear that the deceased died possessed of *bona notabilia* within another jurisdiction, the probate or administration is null and void. *Bona notabilia* are said to be constituted by the possession of personal property to the amount of 5*l.* in another jurisdiction. The same observations apply to the province of York. Where there is personal estate in both provinces, there must be two probates or grants of administration[a]." A case very lately reported, illustrates the law on this subject. We mean *Doe* d. *Allen* v. *Ovens*, 2 B. & Ad. 423, in which an action of ejectment was brought for the recovery of a messuage and lands.

At the trial, before *Bosanquet*, J., at the last Spring assizes at Gloucester, 1831, it appeared that the premises were leasehold, situate in the parish of Frampton Cotterel, in the diocese of Gloucester; that the lessor of the plaintiff was the executor of Thomas Fletcher, who in his lifetime was tenant of the premises; that Fletcher was in the habit of doing jobs with a horse and cart, and that on the 16th April 1829, he was going with his horse and cart, as usual, from his house in Frampton Cotterel to Bristol, and on the way met with an accident, in consequence of which he was taken to the infirmary in the city and diocese of Bristol, and died there in a few days,—having, on the 18th of April, made his will, under which the lessor of the plaintiff claimed. He had no *bona notabilia* in the diocese of Bristol at the time of his death. Probate having been granted by the Bishop of Gloucester, it was objected on the behalf of the defendant that this was irregular, for that, under the circumstances, probate ought to have been taken out in the Prerogative Court; and consequently that the lessor of the plaintiff had no title. The learned Judge refused to nonsuit, but directed a verdict for the plaintiff, giving leave to move that a nonsuit might be entered.

Ludlow, serjt., moved accordingly. The testator died in the diocese of Bristol, and had *bona notabilia* in that of Gloucester. Neither of the diocesan courts, therefore, had entire jurisdiction in administering of his effects, and it was for the metropolitan court to grant probate. It is said in 11 Viner's Abridgment, tit. Executors, H. p. 80 (citing from, though not referring to 1 Roll. Abr. 909, tit. Executor, H. 7.) that "if a man dies in a diocese, not having any goods there, but has *bona notabilia* in another diocese, this will be sufficient *bona notabilia* for the archbishop to grant administration, &c.; because the ordinary where he dies, by the law, is to take as great care of the testator and of his goods, as the other ordinary, where his goods are." [Lord *Tenterden*, C. J.—That only shews that the metropolitan probate, in such a case is not void.] In 4 Inst. 335, Lord Coke describes the prerogative court of the Archbishop of Canterbury as "the court where all testaments be proved, and all administrations granted, where the party dying within his province hath *bona notabilia* in some other diocese than where he dieth." It may be said that this objection is answered by the 92d canon Jac. 1, which provides, that "if any man die *in itinere*, the goods that he hath about him at that present, shall not cause his testament or administration to be liable unto the prerogative court." But here, although the testator had no residence in Bristol, it does not appear upon the evidence that he died, strictly

[a] See the Report printed in the Monthly Record for March last, p. 137.

speaking, *in itinere*; and even if this were so, it is not clear that the canon applies to the present case.

Cur. adv. vult.

Lord *Tenterden*, C. J., now delivered the judgment of the Court. In this case, which was tried before my brother Bosanquet at Gloucester, the question was, whether the lessor of the plaintiff, who claimed a term of years under a will, of which probate had been granted by the Bishop of Gloucester, (the diocese where the lands lie) had a good title? The testator died in the diocese of Bristol, whilst he was *in itinere*. Now, the 92d canon Jac. 1. provides, that where a man dies in a journey, his goods which are with him at the time of his death, are not *bona notabilia*; and we think this case falls within the principle of the canon, which appears to be this, that the goods of the party who so dies are supposed to be for the purposes of the jurisdiction of the ordinary, in the place where he is domiciled, notwithstanding his personal absence. We are therefore of opinion that the verdict was right.

ON THE MISAPPLICATION OF THE REVENUES OF THE INNS OF COURT.

No. VIII.

This enquiry is now likely to be fairly investigated. The present system of admissions to Inns of Court, and calls to the Bar, is referred to the consideration of the Common Law Commissioners; and the existing plan of legal education can hardly escape their attention, and must receive the benefit of their suggestions. It is honorable to the present Attorney General, that although he opposed the original motion, yet, finding that there was a strong feeling in favor of the enquiry, he assented to its taking place. The immediate object of Mr. Harvey's motion was to expose and abolish the irresponsible power of exclusion from the Bar, which is now vested in the Benchers. But the whole subject will, I believe, be investigated by the Commissioners. The grievance complained of by Mr. Harvey is certainly considerable, and is perhaps more obvious and striking than those of which I have complained; but I think that I have proved how prejudicial to the profession and the public is the present system of legal education.[a] I trust that the Commissioners may consider it proper to recommend the institution of regular examinations previous to admission and calling to the Bar, and also lectures on the several branches of the law, by proper persons.

With respect to the present power which the Benchers possess, of excluding any person from admission to the Inns of Court, or from being called to the Bar, without assigning any reason, it seems now very generally condemned as arbitrary and unjust. It is not to be supposed that any one is to gain admission into such societies without any scrutiny whatever; but not only should a legal examination take place, but proper testimonials of respectability and good conduct should be produced; and if a person was refused either admission or to be called to the Bar, the reason should be specified. A set of precedents would thus be made, which, whilst they would serve as a guide to future Benchers, would at once deter many persons from attempting to obtain the degree either of Student or Barrister. I certainly now expect a very considerable modification of the present system, and look forward with great interest to the suggestions of the Commissioners on this subject.

A Cestui que Trust.

[a] For the former articles on the subject, see Table of Contents, vol. III.

SELECTIONS FROM CORRESPONDENCE.

No. X.

ON THE INCONVENIENCE AND DELAY IN TAXING COSTS.

To the Editor of the Legal Observer.

Sir,

As an old subscriber, I take leave to call your attention to a grievance of very long standing—not to the public, but to the profession—*viz.* the mode of taxing costs in the King's Bench. The subject has, I believe, been before mentioned in your columns, but only slightly: I trust you will now be kind enough to notice it sufficiently, and I hope obtain some kind of remedy from the proper quarter. I will give an instance of the inconvenience—to say nothing of loss, to which I have been put by this system; and mine, I know, is not the only one, by very many. Having to tax costs upon a *postea*, which were rather long, amounting to upwards of 200*l*., I and my opponent attended at the Master's office for that purpose at twelve o'clock. After waiting till nearly two, the Master stated that, as my bill appeared so long, he could not take it then—[he had previously taxed the costs of several persons that came in long after me]—

but promised to take them if we attended the following Thursday at twelve. We attended, and waited again till nearly two, when (after having again taxed many other costs out of turn, because they were shorter) he stated he could not take it that day, but we might come down next Wednesday at half past eleven. Now, if business were conducted thus at all the Offices and in all the Courts, an attorney's business would very soon get into arrear—to say nothing of its being rather unprofitable. To all this it may perhaps be answered, that being vacation, I had not the benefit of being, what is called, "on the list." With permission, I will explain what that benefit is. Suppose I *am* on the list: say No. 8. I attend at twelve; wait, perhaps, till two, when the Master will have got through the rules and orders, and a few of the list. Say he has just disposed of No. 7, and I expect to be next. At that moment, perhaps, in come Nos. 2 and 5, and take precedence; and I shall most likely have to come again.

Having stated the grievance, it will naturally be asked, if I have any remedy to propose? I have. I do not say an effectual one. I merely throw this out, to draw forth, if possible, the suggestions of your more able correspondents. My remedy would be very simple; *viz.* to give no priority; and to attain this, I should propose that the Master's clerk have power to issue warrants, the same as in Chancery; or, if it be objected that the Master's time would not be sufficiently and equally filled up, let each party receive a number from the Master's clerk as he comes, and let him go in according to his turn, the same as on summonses, instead of the present disgraceful scramble round the Master, where right is often overcome by might.

J.

[It has always been the practice to give precedence to short taxations under Judges' orders to stay proceedings, &c.; and our correspondent should recollect the disproportion between the number of taxing officers in the Equity and Common Law Courts. If, however, the remedy suggested be deemed useful and practicable, we have no doubt it will be adopted. Ed.]

LOCAL COURTS FOR THE RECOVERY OF SMALL DEBTS.

To the Editor of the Legal Observer.

Sir,

Having read your leading article in the Observer of the 28th ultimo, "on Local Courts for the Recovery of Small Debts," being "consideration of the questions of the Common Law Commissioners," I am induced to add my mite to your valuable suggestions to these gentlemen, who are empowered to inquire and report upon that important subject.

It appears to me, that previously to the Commissioners instituting an inquiry into the necessity for further legislating upon the subject of small debts, it would be well to consider whether many such local courts are not now in existence, and have not existed beyond the memory of man? and whether most of such courts have not become and are now nearly deserted by suitors, in consequence of the right to practise therein, in the characters of counsel and solicitors, being exclusively confined to a few individuals, who have either obtained such a privilege by *purchase* (rather an objectionable mode of dispensing justice), or been appointed to such official capacities in consequence of having had an "*amicus curiæ*," whereby they have obtained advantages over their less fortunate brethren, and to the decided detriment of the public—who, as you very properly and fairly say, decline to become suitors, not choosing to confide their interests to the fortunate few allowed to practise, because they are unknown.

I remember there was a short letter from a Correspondent, signing himself, "Fiat Justitia," in a former number of your periodical, headed "Metropolitan Inferior Courts," pointing out the hardship to the profession, and injury to the public, in the former being excluded from practising in such courts. This letter I had hoped would have been followed by others of a similar import, until the unwarrantable monopoly had been so severely handled as to be compelled "to hide its diminished head," and produce that reform in the administration of justice in the *inferior* Courts, which is as much wanted, in my humble opinion, as in the superior Courts.

I wish some more able pen than mine had been exercised upon this subject, because I am satisfied that were a candid inquiry to be instituted as to the propriety of creating Local Courts, it would be found that the number of Courts having local jurisdictions was ample and sufficient, provided they be thrown open to the profession generally—the members of the *superior* Courts; in which case I will venture to assert, that in ninety-nine cases out of a hundred, all debts under 20*l.* would be sued for in such inferior Courts, and which are now brought in the superior, because the attorney usually employed does not happen to have the right to practise in the former. Before I conclude, I will take the liberty to mention the names of four Courts, which I will borrow from your correspondent "Fiat Justitia," and designate "the Metropolitan Inferior Courts." I mean the Marshalsea Court,—the Lord Mayor and Sheriffs' Courts of the city of London,—and the Borough Court for Southwark: the whole of which Courts have but twenty-one attorneys and fourteen counsel, to the exclusion of a body of the former of 8000 individuals, who annually take out their certificates, and a number equal in proportion of the latter.

I think I am bound to add, that a spirit of justice has lately actuated the City authorities, to overturn a portion of the monopoly so long exercised and complained of; as I understand, from good authority, they have it in contemplation to throw open the Sheriff's Court to the profession at large,—which event, I trust, will be speedily followed by carrying into effect reform of a similar nature in all the other inferior Courts.

Anti-Monopolist.

SIR JONAH BARRINGTON'S PERSONAL SKETCHES.[a]

WITHOUT attempting to give a formal review of this amusing volume, we are induced to make some selections from it relating to members of the Profession. Sir Jonah, who appears to have been well acquainted with all the celebrated men of "his own times," has not confined his "Sketches" either to the Bench and Bar, or the Senate. He has devoted several entertaining chapters to the Faculty, and there is abundant space afforded to duelling, revelling, and many other amusements which flourish in a high degree in the Sister Island. It is our business, however, to notice only those portions of the work which have in some way a legal bearing. We commence with a chapter under the title of "a Barrister besieged," which is entirely devoted to an anecdote of Mr. Curran, who, we are told, was remarkable for his punctuality at dinner time. His mysterious non-appearance on the occasion which is related, gave rise to numerous speculations and reports, in which it seems two hours were uselessly consumed, the river dragged, and every place searched, except his bed-room, where at length he was discovered by one of the maid servants, who returned scarcely able to articulate, declaring "she had seen his ghost just out of the river, quite indecent, straight forenent her." Having learnt the *locus in quo*, the following description is given by Sir Jonah of the result:

"We waited for no more to satisfy us either that she was mad, or that robbers were in the house: each person seized something by way of a weapon: one took a poker, another a candlestick, a third a knife or fire-shovel, and up stairs we rushed. Only one could go in, conveniently, a-breast; and I was among the first who entered. The candles had been forgotten; but the moon was rising, and we certainly saw what, in the opinion of some present, corroborated the statement of Mary. Two or three instantly drew back in horror, and attempted to retreat, but others pressed behind; and lights being at length produced, an exhibition far more ludicrous than terrific presented itself. In a far corner of the room stood, erect and formal, and *stark naked* (as a *ghost* should be), John Philpot Curran, one of his majesty's counsel, learned in the law,—trembling as if in the ague, and scarce able to utter a syllable, through the combination of cold and terror. Three or four paces in his front lay Diver, from Newfoundland, stretching out his immense shaggy carcase, his long paws extended their full length, and his great head lying on them with his nose pointed toward *the ghost*, as true as the needle to the pole. His hind legs were gathered up like those of a wild beast ready to spring upon his prey. He took an angry notice of the first of us that came near him, growled, and seemed disposed to resent our intrusion;—but the moment his master appeared, his temper changed, he jumped up, wagged his tail, licked the parson's hand, cast a scowling look at Curran, and then a wistful one at his master,—as much as to say, 'I have done my duty, now do you yours!' he looked, indeed, as if he only waited for the word of command, to seize the counsellor by the throttle.

"A blanket was now considerately thrown over Curran by one of the company, and he was *put to bed* with half a dozen more blankets heaped upon him: a tumbler of hot potsheen punch was administered, and a second worked miracles: the natural heat began to circulate, and he was in a little time enabled to rise and tell us a story which no hermit even telling his last beads could avoid laughing at. Related by *any one*, it would have been good; but as told by Curran, with his powers of description and characteristic humour, was super-excellent;—and we had to thank Diver, the water-dog, for the highest zest of the whole evening.

"The fact was, that a little while previous to dinner-time, Curran, who had omitted his customary ablution in the morning, went to our allotted bed-chamber to perform that ceremony; and having stripped, had just begun to apply the sponge, when Diver, strolling about his master's premises to see if all was right, placed by chance his paw against the door, which not being fastened, it flew open, he entered unceremoniously, and observing what he conceived to be an extraordinary and suspicious figure, concluded it was somebody with no very honest intention, and stopped to reconnoitre. Curran, unaccustomed to so strange a valet, retreated, while Diver advanced, and very significantly showed an intention to seize him by the naked throat; which operation, if performed by Diver, whose tusks were a full inch in length, would no doubt have admitted an inconvenient quantity of atmospheric air into his œsophagus. He therefore crept as close into the corner as he could, and had the equivocal satisfaction of seeing his adversary advance and turn the meditated *assault* into a complete *blockade*—stretching himself out, and 'maintaining his position' with scarcely the slightest motion, till the counsellor was rescued, and the siege raised.

"Curran had been in hopes that when Diver had satisfied his *curiosity* he would retire: and with this impression, spoke kindly to him, but was answered only by a growl. If Curran repeated his blandishments, Diver shewed his long white tusks;—if he moved his foot, the dog's hind legs were in motion. Once or twice Curran raised his hand: but Diver, considering that as a sort of challenge, rose instantly,

[a] Personal Sketches of his own Times, by Sir Jonah Barrington, Author of the History of the Irish Union. Vol. III. Colburn and Bentley.

and with a low growl looked significantly at Curran's windpipe. Curran, therefore, stood like a *model*, if not much like a marble divinity. In truth, though somewhat less comely, his features were more expressive than those of the Apollo Belvidere. Had the circumstance occurred at Athens to Demosthenes, or in the days of Phidias, it is probable my friend Curran, and Diver, would have been at this moment exhibited in virgin marble at Florence or at the Vatican;—and I am quite sure the *subject* would have been better and more amusing than that of 'the dying gladiator.'"

Passing some spirited descriptions of single combat, recruiting, and martial law, we arrive at a "new mode of serving a process." This process happened to be what is called "a Chancellor's Bill." The process server, whose name was Burke, being met by the "Boys" of Connemara, was desired to *eat* the process, instead of serving it; to which he demurred, as being "too long and crisp, and that he could not eat it all in less than a fortnight any how."

"'Take a bite (said the Connemara boy), if you plase, Mr. Burke.' So he took a bite, plase your honour; but I saw fairly it was too dry and tough for common eating, so I and the rest of *the boys* brought the bum to my little cabin, and we soaked *the chancellor* in potsheen in my little keg, and I towld him he should stay his own time till he eat it all as it was *tinder*, and at three meals a day, with every other little nourishment we could give the crethur. So he stayed very agreeable till he had finished the chancellor's bill every taste, and was drunk with it every day twice, at any rate; and then I towld him he might go back to Galway town and welcome. But he said he'd got kinder treatment and better liquor nor ever the villain of a sub-sheriff gave any poor fellow, and if I'd let him, he'd fain stay another day or two to bid us good bye. 'So Mary,' said I to the woman my wife, 'commodate the poor officer a day or two more to bid us good bye'—'He's a kindly welcome,' says she. So Burke stayed till the 'sizes was over, and then swore he lay for dead on the road-side, and did not know what became of the chancellor's bill, or where it was deposited at said time. I had towld him, your honour, I'd make good his oath for him; and, accordingly, we made him so drunk that he lay all as one as a dead man in the ditch till we brought him home, and then he said he could kiss the holy 'pistle and gospel safe in the court-house, that he lay for dead in a ditch by reason of the treatment he got at Connemara; and Mr. Burke turned out a good fellow; and the devil a prossy-server ever came into Connemara for a year after, but he sent a gossoon aforehand to tell us where we'd catch the sarver afore sarvice. Oh! God rest your sowl, Bum Burke, and deliver it safe! it's us that were sorry enuff when we heard the horse kilt you dead—oh bad cess to him! the likes of ye did'nt come since to our quarter."

Sir Jonah then proceeds to state that this mode of making process-servers eat the process, was not at all confined to Connemara.

"I have myself (says he) known it practised often at the colliery of Doonan, the estate of my friend Hartpole, when his father Squire Robert was alive. It was quite the custom; and if a person in those times took his residence in the purlieus of that colliery, serving him with any legal process was entirely out of the question; for if a bailiff attempted it, he was sure to have either a meal of sheepskin or a dive in a coal-pit, for his trouble.

"This species of outrage was, however, productive of greater evil than merely making the process-server eat his bill. Those whose business it was to serve processes in time against the assizes, being afraid to fulfil their missions, took a short cut, and swore they *had* actually served them, though they had never been on the spot;—whereby many a judgment was obtained surreptitiously, and executed on default upon parties who had never heard one word of the business:—and thus whole families were ruined by the perjury of one process-server.

"The magistrates were all country gentlemen, very few of whom had the least idea of law proceedings further than when they happened to be directed against themselves; and the common fellows, when sworn on the holy Evangelists, conceived they could outwit the magistrates by kissing their own thumb, which held the book, instead of the cover of it; or by swearing, "By the vartue of my oath it's through (true), your worship!" (putting a finger through a button-hole.)

"So numerous were the curious acts and anecdotes of the Irish magistrates of those days, that were I to recite many of them, the matter-of-fact English (who have no idea of Irish freaks of this nature) would, I have no doubt, set me down as a complete romancer.

"I conceived it would much facilitate the gratification of my desire to learn the customs of the Irish magisterial justices by becoming one myself. I therefore took out my *didimus* at once for *every* county in Ireland; and being thus a magistrate for thirty-two counties, I of course, wherever I went, learned all their doings; and I believe no body of men ever united more *authority* and less *law* than did the Irish justices of thirty years since."

We venture upon another extract, headed *Reminiscences of wit*, which is preceded by a learned dissertation on the distinction between wit and ribaldry. It would be almost impossible, says the author, to enumerate the wits and humourists of Ireland in his early days. Wit was then regularly *cultivated* as an accomplishment, and was in a greater or less degree to be found in

every society. And farther on he observes that the members of the Irish bar were then collectively the best home-educated persons in Ireland, the elder sons of respectable families being almost uniformly called to that profession. Among them, nevertheless, were some of humbler origin. Jeremiah Keller was such, but his talent sufficed to elevate him.

"Keller was a good man, generally liked, and popular with a considerable portion of his profession. But though not rich, he occasionally exercised an independence of mind and manners which gave great distaste to the pride and arrogance of some of the leading authorities. Lord Clare could not endure him, and never missed an opportunity of showing or affecting to show his contempt for Jerry.

"Lord Clare having died *of the Union* and the *Duke of Bedford*, it was proposed by his led captains and partizans, that the bar, in a body, should attend his funeral procession. But as his Lordship had made so many inveterate foes at the bar, by taking pains to prove himself *their* foe, it was thought necessary to *canvass* the profession individually, and ascertain who among them would *object* to attend. Very few did;—not that they cherished any personal respect for Lord Clare, but wished to compliment the remains of the first Irish chancellor. As Keller was known to be obstinate as well as virulent, it was held desirable to conciliate him if possible—though they anticipated the certainty of a direct refusal.

"The deputation accordingly called on him: 'You know, my dear fellow,' said Arthur Chichester M'Courtney, who had been deputed as spokesman (beating about the bush), 'that Lord Clare is to be buried to-morrow?'

"'*'Tis* generally the last thing done with dead chancellors,' said Keller coolly.

"'He'll be buried in St. Peter's,' said the spokesman.

"'Then he's going to a friend of the family,' said Keller. 'His father was a papist.'

"This created a laugh disconcerting to the deputation;—however, for fear of worse, the grand question was then put. 'My dear Keller,' said the spokesman, 'the bar mean to go in procession; have you any objection to attend Lord Clare's funeral?'

"'None at all,' said Keller, 'none at all! I shall certainly attend his *funeral* with the *greatest pleasure imaginable!*'

"Examples of Keller's dry species of wit in fact daily occurred; it was always pungent, and generally well-timed. In the year 1798 flourished Sir Judkin Fitzgerald, Bart., a barrister whose loyal cruelties in the county of Tipperary were made the subject of a *post facto* indemnity bill by Lord Castlereagh, to save him from punishment. Among other pastimes, he caused cats-o'-nine-tails to be soaked in *brine*, that the peasantry and every body else at whom he durst have a fling might be better cut, and remember it the longer. Bragging to Keller of his numerous ultra-loyal achievements, this man said, 'You must own, Keller, at least, that I preserved the county of Tipperary.'

"'Ay, and you *pickled* it into the bargain!' said Keller: 'you promise to make so good a body confectioner, that I dare say the lord-lieutenant will hire you;' and in fact Sir Judkin was soon afterward put in office at the castle.

"The unfortunate counsellor Norcott, heretofore mentioned in these sketches, was a fat, full-faced, portly-looking person. He had a smirking countenance, and a swaggering air; was an excellent *bon vivant*, a remarkably good mimic, and affected to be witty.

"Speaking of the Catholics in the hall of the Four Courts, Keller seemed to insinuate that Norcott was favourable to their emancipation.

"'What!' said Norcott, with a great show of pomposity—'what! Pray, Keller, do you see any thing that smacks of the *Pope* about me?'

"'I don't know,' returned Keller; 'but at all events there is a great deal of the *Pretender*, and I always understood them to travel in company.'"

There are some other specimens in the same chapter, but not equally available to our present purpose, and we must refer to the volume for numerous portraits of Irish character, sketched with great effect. Our commendation, however, is not needed, for it appears by the Dedication that Lord Stowell has described the work as in great repute, as having afforded him much amusement, and giving much insight into the original character of the Irish.

THE LONG VACATION.

The Long Vacation is now fast approaching, not, as in last year, deprived of its fair proportions, but commencing even before its olden time. The Master of the Rolls a fortnight ago terminated his labours, and is now, no doubt, traversing the luxuriant plains of Lombardy. The Vice Chancellor rose on the 10th, and may soon be seen any morning at the peep of day sauntering among the magnificent oaks of Studleigh. The Lord Chancellor disposed of all remaining matters on Wednesday last, and will probably pay Ireland his promised visit. The learned Judges of the Court of Review have declared their intention of sitting as long as there is any thing further to do; but as this reason cannot keep them very long in town, we soon hope to find that

they have also taken flight, and relaxed for a time their arduous duties. Some of the circuits still linger at their last town, and the cholera has occasioned the York assizes to be postponed until the 27th; but these will also soon be over, and the northern circuit will be free. The various offices are now preparing to close. The Masters (saving, as we hear, only one, *not* the Vacation Master, who is determined to sit on) are now making their last reports and issuing their last warrants, and are eager to depart.

The Judges being thus disposed of, the bar are not slow in following their example. One can hardly go into Lincoln's Inn or the Temple without being reminded that the holydays are come, and that some are about to take flight. Before a fortnight has passed, one half of the doors now open will be closed, and courts and squares, a week ago busy with people, will be solitary and grass-grown. If any lawyer be particularly wanted, go to the watering places, to Paris, to the Rhine, to Italy, to any place but his chambers.

This vacation, we think, is one of the great privileges of our profession. It is absolutely necessary that the lawyer should have some certain repose in the course of the year; he could not otherwise achieve the great exertion which at times he is obliged to make. We look upon it as a wise institution, and most heartily wish all our indulgent readers who may choose to avail themselves of it, all health and happiness on their journeys.

SITTINGS IN CHANCERY.

Sittings before Michaelmas Term*, 1832, *and business appointed in Michaelmas Term.

BEFORE THE LORD CHANCELLOR.

At Lincoln's Inn.

Thursday	Nov. 1	The Seal before Michaelmas Term — Motions.

At Westminster.

Friday	2	Motions.
Saturday	3	Petitions.
Monday	5	Re-hearings and Appeals.
Tuesday	6	
Wednesday	7	
Thursday	8	Motions.
Friday	9	Re-hearings and Appeals.
Saturday	10	
Monday	12	
Tuesday	13	
Wednesday	14	
Thursday	15	Motions.
Friday	16	Re-hearings and Appeals.
Saturday	17	
Monday	19	
Tuesday	20	
Wednesday	21	
Thursday	22	Motions.
Friday	23	Re-hearings and Appeals.
Saturday	24	
Monday	26	Motions.

BEFORE THE VICE CHANCELLOR.

At Lincoln's Inn.

Thursday	Nov. 1	The Seal before Michaelmas Term — Motions.

At Westminster.

Friday	2	Motions.
Saturday	3	Petitions.
Monday	5	Pleas, Demurrers, Exceptions, Causes, & Further Directions.
Tuesday	6	
Wednesday	7	
Thursday	8	Motions.
Friday	9	Pleas, Demurrers, Exceptions, Causes, & Further Directions.
Saturday	10	
Monday	12	
Tuesday	13	
Wednesday	14	
Thursday	15	Motions.
Friday	16	Pleas, Demurrers, Exceptions, Causes, & Further Directions.
Saturday	17	
Monday	19	
Tuesday	20	
Wednesday	21	
Thursday	22	Motions.
Friday	23	Pleas, Demurrers, Exceptions, Causes, & Further Directions.
Saturday	24	Short Causes & Ditto.
Monday	26	Motions.

SUPERIOR COURTS.

ROLLS.

EFFECT OF CANCELLATION OF A DEED.

The effect of the cancellation of a deed at law, is to destroy it altogether.

In equity the effect is the same, unless the cancellation has taken place under some mistake or misapprehension of the effect of the deed; and whether there was any such mistake or misapprehension, may be determined by the Court, by reference to the subsequent conduct of the party cancelling, in respect of property settled by the deed cancelled.

By a settlement, made in October, 1769, on the marriage of Lewis Mathias and Elizabeth Bowker, lands were limited to the husband and wife successively for their lives, with powers of appointment amongst their issue, which they never executed, with remainder to the children of the marriage in tail, with other remainders, which never took effect; and the ultimate remainder was to the wife in fee. The settlement contained a power of sale to the trustees, with the consent of the husband and wife; and the purchase money was to be reinvested in the purchase of other lands; and until such reinvestment, the interest of the money was to go to the same persons as the rents. There were two children of this marriage, a son and a daughter. A part of the land was sold for 2900*l.*, which was laid out in the purchase of 4000*l.* reduced bank annuities, in the name of Lewis Mathias. The plaintiff married the daughter; and by the settlement on their marriage, in September, 1804, between Lewis Mathias, of the first part; the plaintiff, of the second part; Zenobia Ann Mathias, the daughter of Lewis Mathias, of the third part; and John Mathias and Robert Bateman Burt, of the fourth part; reciting that the said Zenobia Ann Mathias was entitled to a moiety of 3528*l.* 14*s.* 6*d.* Old South Sea annuities, and the entirety of 600*l.*, three per cent. consols, subject to the life interest of Lewis Mathias; and was also entitled, in tail, to a moiety of the lands to be purchased with the 4400*l.*, three per cent. annuities; and was then entitled, as tenant in tail, to a moiety of the 4400*l.* bank annuities, then standing in the name of Lewis Mathias. She the said Z. A. Mathias assigned these sums to J. Mathias and R. Bateman, subject to the life interest of Lewis Mathias; and the parties covenanted to petition the Chancellor for an order under the statute, in order to discharge the 4400*l.* from the estate tail: and the trusts of the monies thereby settled were declared to be, after the marriage, subject to the life interest of Lewis Mathias, in trust for the separate use of Zenobia Ann Mathias, during her life; remainder to the plaintiff, during his life; remainder to the children of the marriage, as therein mentioned; with remainder to John Mathias and his children, as therein mentioned, which, by his death without children, can never take effect; and with the ultimate remainder to the plaintiff, his executors, administrators, and assigns. The marriage took effect. The plaintiff, soon after the marriage, in consideration of 500*l.*, assigned his interest to Lewis Mathias, by an indenture dated the 12th of October, 1805. Lewis Mathias having died, and his executors having renounced probate, administration with the will annexed was granted to the defendant and Charles Mathias, the residuary legatee. The bill set forth several letters from the defendant, to the effect that he would give up to the plaintiff the deed executed by him to Lewis Mathias; and in 1804, the defendant cancelled the deed, by cutting off the signature and seals, which he threw into the fire, and then placed the deed in the hands of the plaintiff. Zenobia Ann Hassell died in April, 1815, without ever having had a child. Lewis Mathias, in his life time, sold out the 4400*l.* The bill prayed that the indenture of the 12th of October, 1805, might be declared to have been cancelled, and that the plaintiff might be declared entitled to a moiety of the 4400*l.* three per cent. reduced annuities, and the dividends, from the death of his wife, and that the defendant, Charles Mathias, might make good the same out of the estate of Lewis Mathias. The other facts will be found in the judgment.

Mr. *Tinney* and Mr. *Willcock*, for the plaintiff.

Mr. *Wilbraham*, for the defendant.

The Master of the Rolls. — The plaintiff claims to be entitled to a moiety of the sum of 4400*l.*, which, in the settlement made on his marriage, was represented to stand in the name of Lewis Mathias; and in the events which have happened, the plaintiff has become entitled to it, unless for the reasons which are now to be stated. It appears that the plaintiff became embarrassed in his circumstances, and in order to raise a present sum of money, he assigned all his expectant interests to Lewis Mathias, who left the defendant his executor. The defendant delivered up the deed of assignment, representing that property to which the plaintiff was entitled under the settlement, to be cancelled, and actually cancelled it with his own hand. The effect of the cancellation of a deed at law, is to destroy the deed altogether. In equity, it will be equally destroyed, unless it appears that the cancellation has taken place under some mistake or some misapprehension with respect to the effect of the deed. The defendant insists, by his answer, that he never meant to do more than to release his claim to certain trust funds, comprised in the same marriage settlement, and in which the plaintiff would have an equal interest to that which he claimed in the 4400*l.*; but he did not mean to relinquish his claim under the assignment, to this sum of 4400*l.* It lies upon the defendant, who claims an equity upon this alleged restriction of his gift, to establish that fact. He has not established that fact. It is not pretended that there is any evidence whatever, that at the time the cancellation took place there was any such re-

striction as that of which the defendant speaks in his answer. All the letters which he wrote upon the subject, and which have been proved and read in the cause, are altogether inconsistent with any such restriction. There is one letter, in March 15th, wherein the defendant, whilst the plaintiff's wife was with him in the house of Lewis Mathias, who was just dead, writes to the plaintiff thus: "The title deeds of the house in Manchester, are deposited in Mr. Preist's hands, along with your wife's settlement; but the deed you executed in favor of my uncle, is in my possession, and I will deliver it over to you according to my promise. She desires me to say, that Mr. Willey has examined the copy of her mother's marriage settlement, and that he is of opinion that her brother's part being vested in him at the age of twenty-one years, and he afterwards dying without a will, according to the statute of distributions, his moiety goes between his widow and father; but let that be as it will, I won't receive any part of it." Now this part of the letter is extremely material for the case of the plaintiff. It seems that a question had arisen, there being two children of the marriage of the father and mother, namely, the plaintiff's wife, and a brother of the name of John, and a question had arisen, John being dead, whether the interest that he was entitled to under his father's settlement, was or was not the property of the surviving sister, the wife of the plaintiff. The reference here is made to that question, and the defendant states, "Let that be as it will, I won't receive any part of it." Now a part of what this dispute referred to, was this very sum of 4400*l.*; that was a part which had arisen under the settlement of the father and mother, in respect of the sale of lands comprised in the settlement. This, therefore, is an express declaration, that as to the moiety which John's representatives claimed, if their claim was unfounded, it belonged to the wife, and consequently the husband would take an interest under his settlement; "however that might be, he would not claim any part of it." Now this is perfectly inconsistent with the answer, in which he states, that he meant only to release to the husband that property comprised in the settlement, which was in the hands of the trustees. It proves he did mean to include all which was comprised in the settlement. The letter then proceeds, in another part, which has been observed upon as material to the defendant: "You will find out by the deed I shall give you, the different sums which are invested in the funds, in the trustees' names, and which they will no doubt legally transfer." This deed to which he refers, expressly states that there was the sum of 4400*l.* stock in the hands of the father-in-law; that there was also a large sum of South Sea annuities in the hands of the trustees; and there was also a sum of 600*l.* stock in the hands of his father. Now it is said, that he here refers only to sums which were in the hands of the trustees: his expression is, "he has no doubt they will legally transfer those sums." How is that inconsistent with the notion that this deed, to which he refers, and which expressly states certain other sums of money which were comprised in the assignment, which it was intended to cancel? How does that raise any thing like evidence that he did not mean that all those sums should pass by the cancellation of the deed? The cancellation is perfectly consistent with the notion insisted upon by the plaintiff, that the cancellation was to extend to all the sums. Yet if he had meant at that time not to release his right to the plaintiff with respect to this sum of 4400*l.*, is it possible he would not (referring to the deed, and seeing that was one of the sums comprised in the assignment) have stated that his cancellation will not extend to this sum? It does not, however, rest here; for there is other evidence which is quite conclusive, that it had not entered into his mind to make the resistance which is made in this answer to this bill. In the year 1817, the plaintiff files a bill against him, and certain other persons who represented the brother John; and the bill of the plaintiff claims the moiety of this sum of 4400*l.*, and claims also the moiety of the South Sea annuities, and the entirety of the 600*l.* stock. The plaintiff's solicitor writes to the defendant, and states to him, this is an amicable bill—this bill is meant amicably, to have it settled between the plaintiff's wife and her brother John. What is the effect of the transactions that have taken place, as they affect John's moiety? John being then dead, and his representatives claiming that moiety, the solicitor sends a copy of the bill, making the claim, among others, for this sum of 4400*l.* The defendant answers the letter, sending him this copy of the bill, by stating that "the facts stated in the bill are not accurate. I have handed it over to Mr. Willey, my solicitor, and he will write to you upon the subject." Mr. Willey accordingly writes to the plaintiff upon the subject, and he states what are the inaccuracies of which the defendant speaks in his letter; they are inaccuracies of no importance to the present purpose; but Mr. Willey's letter states this: "The settlement represents the sum of 4400*l.* three per cent. consols, to be in the hands of Mr. Lewis Mathias, the testator; and it represents also the further sum of 600*l.* stock to be in the hands of the said Lewis Mathias: now that is inaccurate. The defendant has examined, and finds that there are no such sums in the name of Lewis Mathias; but being mentioned in the wife's settlement, I presume the defendant must pay them." Now is it possible, that if the defendant, at the time that answer was written, entertained an opinion that he had not, by the cancellation of that deed, given to the plaintiff all that the plaintiff had assigned to Lewis Mathias, and consequently that he the defendant at that time was entitled to those two sums which that bill claimed, he would not have then represented "this bill is mistaken in claiming these two sums, and you are mistaken in calling this an amicable bill between the plaintiff and me the defendant; for it is not an amicable bill, because it asks two large

sums, to which I am entitled in respect of the understanding between us; at the time when I cancelled the deed of assignment, the interest in these sums was to be reserved." It is quite impossible that that would not have been the case, if the notion suggested in the answer of the defendant had then possession of his mind. It seems afterwards, as the representatives of John were resident in Ireland, that this suit could not be beneficially prosecuted, in consequence of those persons being out of the jurisdiction. The plaintiff afterwards amends the bill, and he reduces it to a claim, not of 4400*l.*, but striking out the 4400*l.*, in which the representatives of John were interested, he claims only the sum of South Sea annuities, in which the representatives of John had no interest, and he obtains a consent decree for that sum. Why he did not proceed in the suit for the sum of 600*l.* stock also, is not explained; and there would be a difficulty arising, if it had not been for the subsequent transactions, because although he could not effectually prosecute the suit in respect of the sum of 4400*l.* by reason of the interest which the representatives of John had in that sum, they being out of the jurisdiction; yet there was no possible reason why he should not have proceeded for the 600*l.*, which was also stated in the settlement to be in the hands of the trustees, and to which, therefore, John's representatives had no claim whatever. It so happened, however, that he did not proceed in that suit for the 600*l.*, which stood in precisely the same circumstances as the 4400*l.*, having been represented as invested in the funds by the testator, and not being found in the funds. But two years after he had obtained by the effect of this suit that sum of South Sea annuities, he files another bill in 1819, and he files that bill against the defendant, claiming this 600*l.* as a sum of 600*l.* represented in the settlement to be standing in the name of Lewis Mathias, the testator: the present claim of 4400*l.* was represented in the same settlement in the same way. Now here is another occasion upon which (if the defendant had then entertained the notion that the plaintiff was not entitled to this sum of 600*l.* by reason of the assignment which he had made to the testator, Lewis Mathias,) he might have asserted that claim. He resists that claim, not resisting it upon the ground that by the cancellation of the deed he did not mean to transfer the interest to the plaintiff; but his attorney, Mr. Willey, writes, as to that 600*l.* you have not established your title to it. It was recited in the settlement to be his wife's property, and I suppose the meaning of his not having established his title to it was, that he had not established it to be his wife's property, and consequently the sum passing by the settlement. Here, again, is another occasion upon which he was bound to bring forward the claim now asserted by his answer, and in which no such claim is brought forward; and therefore I cannot but come to this conclusion, that this cancellation of the deed is to have, in equity, the same effect as it would have at law, namely, it is a destruction of the whole deed, and the decree, therefore, must be for the plaintiff. The decree will be for 2,200*l.* three per cents., and the dividends from the death of the wife of the plaintiff. There is another circumstance which has struck me, upon reading the papers, which was never mentioned at the bar nor in the pleadings. The assignment comprised not only the sum of stock, but it comprised also the life interest of the plaintiff in the freehold estate included in the settlement of the father and mother. Now it has never been stated, either upon the pleadings or in the course of the argument, that the defendant has claimed those rents and profits, because, according to what he states in his answer, namely, that he meant only to release the sums in the hands of the trustees, he would have been entitled to the rents and profits of the estate. What has happened does not appear in the answer, and my conjecture is, that the plaintiff has continued in the enjoyment of the rents and profits.—*Hussell* v. *Mathias*, June 14th, 1832. M. R.

KING'S BENCH.—PRACTICE COURT.

SERVICE OF PROCESS.—FILING COMMON BAIL FOR DEFENDANT.

The service of process, in order to entitle the plaintiff to file common bail, must be personal.

Comyn shewed cause against a rule, for setting aside a notice of declaration and all subsequent proceedings, on the ground that no process had been served. In answer to the application, the attorney for the plaintiff swore, that he had gone to the shop of the defendant, a bookseller, in Fleet Street, and enquired if he were at home. The person in the shop told him, that the defendant was at home, but engaged; he waited a considerable time in the shop, and while there, he frequently heard the defendant speaking in a room behind the shop He at length informed the shopman what was his business, and offered him the process, to give his master. This he refused to do; but the deponent left the process with him, and came away from the shop. When he so left the process, the shopman said, "mind this is no service." It was submitted that this was sufficient service; it must be presumed that the process had come to the knowledge of the defendant. If it had, then it came within that class of cases in which defendants had refused or avoided the taking of process into their hands, although it had been actually brought into their presence. Thus, it had been holden, that where a defendant had locked himself in, and the process was put through a crevice in his door, the service was good.

Patteson, J.—The plaintiff in this case, it appears, has declared conditionally. If the defendant should not appear, can the plaintiff make such an affidavit of service as will entitle him to file common bail according to the statute?

Comyn.—I apprehend he might make such

an affidavit on this state of facts as would entitle him to file common bail for the defendant. He cited the case of *Rhodes* v. *Innes*[a], where the father eluded service of process: service on the son, who said his father was in the house, and should receive the writ, held equivalent to personal service of the father. *Cur. adv. vult.* June 12th.

Patteson, J.—In this case, I have made enquiries at the office of common bails, what is the course pursued where a plaintiff files common bail for a defendant; and I understand that a practice has crept in, that the party seeking to file the common bail, brings any affidavit, of any kind or sort, which states that the defendant has been served personally, and then sets forth the particular mode of service, which is not personal service at all. It is then pointed out to the party producing the affidavit that the service is not personal, but nevertheless he is allowed to file common bail, leaving it to the other side to appear and set it aside. This course of proceeding is exceedingly improper, and I have given directions that it shall be discontinued for the future. From the affidavit of service, in the present case, there is nothing from which it appears that the process was brought to the personal knowledge of the defendant. All that is there stated, merely amounts to an attempt to serve the defendant. In a case decided by Mr. J. *Taunton*, in the last term, several attempts were made, without success, to serve the defendant personally. There, however, Mr. J. *Taunton* would not allow the service to be good, although it was quite clear that the defendant wilfully avoided service. A case in the Common Pleas, of *Rhodes* v. *Innes*, has been mentioned, where common bail had been filed by the plaintiff, after an affidavit of special service, and the Court refused to set aside a common appearance, although it was understood, that a strictly personal service had not been effected. In that case, however, the decision of the Court depended on the peculiar circumstances stated in the affidavits, and there was no doubt there that the process had come to the defendant's hands. But great danger may arise, if once the officer of the Court is allowed to receive and act upon an affidavit, not within the act of parliament, and file common bail at his own discretion. It is true, that subsequent to the time of that case an application was made by Mr. *Pitt*, in person, for the purpose of rendering a special service equivalent to a personal service, so as to enable him to enter an appearance for the defendant according to the statute. He stated several circumstances, shewing attempts on the part of the defendant, against whom he applied, to avoid service. The Court took time to consider, but refused his rule. That case is quite inconsistent with the practice of the office. I think that there ought to be an affidavit of personal service, in order to entitle the plaintiff to file common bail. All the other Judges are of the same opinion. Now the question is, could the deponent in this case have made an affidavit of personal service? I think he could not. I don't mean to say, that it is necessary to leave the process in the actual corporal possession of the defendant; for, whether the party touches him, or puts it into his hand, is immaterial for the purpose of personal service. Personal service may be, where you see a person, and bring the process to his notice. It seems to me better to hold the rule strict, in authorizing a plaintiff to enter an appearance for a defendant. I am quite of opinion, that in this case there are not sufficient facts to warrant any man in making an affidavit of personal service. If the deponent had informed the defendant of the nature of the process, and thrown it down, that would do. Then the question is, whether I should set aside this declaration? As the declaration has been filed *de bene esse*, it is of no use, unless the plaintiff could file common bail: now he could not do so. I think, therefore, that this rule ought to be made absolute, but without costs.

Rule absolute, without costs.—*Thomson* v. *Pheney*, June 12th, 1832. K. B. P. C.

[a] 7 Bing. 329.

PROHIBITION.—COSTS.

Where a rule is made absolute for issuing a prohibition, the costs of the rule cannot be granted to the successful party, under 1 *W.* 4, *c.* 21, § 1; *that statute only applying to cases, where there have been pleadings in prohibition.*

Whateley applied for costs, under 1 W. 4. c. 21. § 1, on making a rule absolute for a prohibition. The words of that section were, "Judgment shall be given that the writ of prohibition do or do not issue, as justice may require; and the party in whose favour judgment shall be given, whether on nonsuit, verdict, demurrer, or otherwise, shall be entitled to the costs attending the application and subsequent proceedings, and have judgment to recover the same."

Patteson, J.—It appears to me, that this section does not apply where there are no pleadings. Before this act, costs were not granted, except in cases where there were pleadings[b].

Costs refused.—*Rex* v. *Keuling*, June 9th, 1832. K. B. P. C.

[b] 2 Tid. Prac. 948, ed. 9.

NOTICE OF TRIAL.—WAIVER.

A request by a defendant, that a notice of trial may be put through his door, is no waiver of a personal service of notice of trial.

Channel shewed cause against a rule for setting aside the verdict, and all subsequent proceedings in this case, on the ground that no notice of trial had been given. The notice

of trial had been put through the door of the defendant's office, and the defendant swore it had "never come to his hands, possession, or knowledge." It was, however, sworn on the part of the plaintiff, that the defendant had requested the plaintiff's attorney to put the notice of trial through the door of his office, for fear of alarming his wife. This was a sufficient waiver of the defendant's right to a personal service of the notice, without an acknowledgment of its having come to his hands.

Taunton, J.—That is not sufficient, unless you have an acknowledgment of its having come to his hands.

Rule absolute.—*Fry* v. *Mann*. May 12th, 1832. K. B. P. C.

NOTES OF THE WEEK.

House of Lords.

FINES AND RECOVERIES.—LIMITATION OF ACTIONS.—INHERITANCE.—CURTESY.—SHERIFFS' EXPENSES.

The list of Bills in progress still contains these, as waiting for second reading.

SENTENCE OF DEATH.

Waiting for the report.

THE LORD CHANCELLOR'S SALARY.

This Bill has passed the House of Lords.

BANKRUPT LAWS AMENDMENT.

This Bill has at length passed both Houses.

FORGERY.

An amendment of this Bill has been carried in the Committee of the Lords, excepting the cases of Wills and Powers of Attorney from the clause abolishing the punishment of Death.

CHANCERY REFORM.

A Bill "for the Improvement of the Administration of Justice in the High Court of Chancery in England," has been presented by the Lord Chancellor, and read a first time. His Lordship stated his object to be to have it printed, in order that those noble Lords who took a particular interest in the question might have ample time and opportunity to consider its provisions.

The changes intended to be effected by this Bill are:

1. The abolition of the Report Office.
2. The better regulation of the Register Office.
3. The improvement of the Masters' Offices.
4. Establishing a Court of Appeal, consisting of the three heads of the Court of Chancery.

The alterations of the Six Clerks' Office and Subpœna Office are not included in this Bill.

House of Commons.

EXCHEQUER COURT OFFICERS.—LORD CHANCELLOR'S BILL.

These Bills have been read a third time and passed.

NEW KING'S SERJEANT.

Mr. Serj. Spankie has been promoted to the rank of King's Serjeant.

NEW KING'S COUNSEL.

Mr. Beames, Mr. Swanston, Mr. Rolfe, and Mr. Joy, have been promoted to the rank of King's Counsel.

Royal Assents.

CHANCERY SINECURES.—EXCHEQUER COURT OFFICERS.—BANKRUPT ACT AMENDMENT.—LORD CHANCELLOR'S SALARY.—FORGERY.

The Royal Assent has been given to these Bills.

ANSWERS TO QUERIES.

LAW OF LANDLORD AND TENANT.

BANKRUPT LESSEE. P. 239.

Your correspondent X. D. should state whether it was an *assignment* or an *underlease* which the bankrupt made, their operation being very different. I apprehend the bankrupt was not bound (under the 75th sec. of the new Bankrupt Act) to give up possession, and that neither he nor his assignees were bound to give any notice at all to the landlord; for the

section (75) only extends to leases to which the bankrupt is entitled at the time of his bankruptcy. Now if he had *previously* assigned it, he could be no longer entitled to it, and I should suppose would not have it in his possession to give up to the landlord. If it was an assignment which the bankrupt made *prior* to his bankruptcy, I apprehend that neither such assignment, nor the lease included in it, could be put an end to without the concurrence of the assignee: every one who has an estate in lands, &c. for years may assign it. Com. Dig. tit. Assignment (A). Therefore the lessor would not be entitled to possession, and must look for the rent, and performance of covenants, to the assignee of the lease, who is liable to be sued on the covenants (even before he takes possession) from the time of the assignment. See Doug. 462. (n. 1.) If it were an *underlease* which the bankrupt made, then I apprehend, the original lease being determined by the bankrupt's surrender of it, the underlease would be determined also; the landlord's reversion would immediately commence, and he would have an action of ejectment to recover possession, and (if such action were defended) might recover rent from the bankruptcy (by laying his demise immediately after the bankruptcy) in an action for mesne profits; but he could not recover for dilapidations or breaches of covenant *subsequent* to the bankruptcy, as his claim to possession would be founded on the plea that both lease and underlease were then determined. J.

LAW OF ATTORNEYS.

ATTORNEY'S LETTER.—TENDER. P. 240.

1. No costs can be incurred to which the defendant can be legally made liable till action brought. Tender of the *debt* (alone) *previously*, is an answer. Brown's Tender, 9. If the attorney was authorized to write, and *threatened suit on nonpayment*, tender of the *debt* to him, or his client, before suit, is an answer. It is very common to demand charges for letters and attendances; but the debtor is not liable to them: and in the case put by A. A., I think tender of the debt alone, either to the attorney or his client, would be a legal tender. See Douglas, 624. J.

2. In answer to A. A., a tender before action, of the debt, would bar a subsequent action commenced without a re-demand. The safer way is to issue a bill of Middlesex, contemporaneously with the letter, which costs 6*d.* in term, and 10*d.* in vacation: this secures 5*s.* for the letter. See a late case of *Morrison* v. *Summers*, 2 Legal Ob. Your constant reader, A. *

RECOVERING COSTS. P. 240.

1. The 10th sec. of 2 G. 2. c. 23, requires an *express consent in writing* from one attorney of the superior courts to another, to practise in a court wherein he is not admitted. This recognizes the necessity of admission, or *that which is considered equal to it*, to enable an attorney to practise in any of the superior courts. The competence of the agent, I think, matters not, and in the face of sec. 10. cannot aid the principal. What he did was the act of his principal; 2 Durnf. & East, 711; 3 East, 569; 3 Bro. & Pull. 111; who it appears was not duly qualified to practise in these courts. A solicitor in Chancery cannot authorize a solicitor in the Exchequer to practise there in his name; 4 Taunt. 452. I therefore think the country attorney cannot recover. J.

2. By 2 G. 2. c. 23. § 10. it is also declared to be lawful for any person who shall be sworn, admitted, and enrolled to be an attorney in any of his Majesty's Courts of Record at Westminster, &c. by and with the consent and permission of any attorney in any of the said other Courts of Record, &c., such consent being in writing signed by such attorney, and in the name of such attorney to sue out any writ or process, or to commence, carry on, prosecute, or defend, any action or actions, or any other proceedings, in such Court, notwithstanding such person is not sworn or admitted to be an attorney of such Court.

As a consequence, he may recover the costs of such proceedings. I rather think there is an expression, enactment, or decision as to this, which some of our readers who have more leisure than myself may probably find.[a] A. *

COMMON LAW.

WITNESS.—BILL OF EXCHANGE. P. 240.

The indorsee of a bill of exchange *can subpœna* and examine the drawer of the bill, to prove the acceptor's hand-writing. See Chitty on Bills. 4 Esp. Rep. 32. 5 Esp. 119. J.

TENANTS IN COMMON.—ELECTIVE FRANCHISE, P. 224, *ante*.

In answer to the queries of "ASPIRO," I think that the husbands of the married daughters could, previously to the Reform Act, have claimed the elective franchise, and that there is nothing in the act to disfranchise them; and that their tenants are likewise entitled, if they possess the qualifications required by the act. I conceive the queries were put from an apprehension that there was something in the nature of the tenures of these parties that would incapacitate them; but I think this apprehension unfounded. T.P.

LAW OF PROPERTY AND CONVEYANCING.

BANKRUPTCY.—CONVEYANCE. P. 240.

1. Although sections 73. 81. and 86. of the new Bankrupt Act, are contradictory and in-

[a] It was decided last Term in the Exchequer, that a solicitor in Chancery, not admitted in the Exchequer, can recover his costs in the latter Court. *Attorney-General* v. *Malim*.—ED.

comprehensible when taken together, particularly 73 and 81, still I think the case put by W. S. comes within the *express* exception of § 73, as a conveyance for valuable consideration; and that *A.'s* assignees cannot disturb it. J.

2. The conveyance of the 24th June, if it included the trader's stock, was an act of bankruptcy *per se*, and the property is recoverable by the assignees; if otherwise, being made by an insolvent trader a day before his bankruptcy, no jury would hesitate to say it was in contemplation of bankruptcy. A.

LEASE FOR A YEAR.—STAMP DUTY. P. 223.

1. E. F. having given it as his opinion that a progressive duty is not requisite on a lease for a year, unless it exceeds forty-five folios, and this being quite a novel interpretation of the clauses in the Stamp Act relating to the matter, and as the subject is very frequently one of importance, I shall be glad to know upon what grounds the opinion is founded. Whilst on the subject, I cannot refrain from expressing regret that there is no tribunal for the summary appeal and decision of questions arising on the Stamp Act. Upon the very point above discussed, the officers at the Stamp Office are of one opinion, and the majority of the profession of another. T. P.

2. Your correspondent on the subject of the stamp duty on leases for a year, is inaccurate. A lease for a year is in the nature of a *bargain and sale*, and is subject to the progressive duty, precisely the same as other deeds. J. P.

C ITICE

NEW PROCESS ACT.—NOTICE TO WRITS. P. 240.

It would be futile to write a notice on a writ which contains *per se* that notice. A comparison of the writ of summons and notice shews that they are analogous, the only omission being that *an attorney* is not mentioned as a mode of appearance, which mode is not the only mode. Surely, therefore, the Court would hold that the writ contained a sufficient notice under the act. T. T. is therefore *wrong*. A. X.

QUERIES.

LAW OF LANDLORD AND TENANT.

RENT SECK.—ASSIGNMENT.

A. being possessed of a house for a term of years, granted an underlease thereof to *B.*, for all his term, except a few days, at the yearly rent of 20*l.* Afterwards *A.* assigned the rent, without the concurrence of *B.*, to *C.*, leaving the reversion expectant on the underlease still in *A.* The rent is in arrear. Can *C.* distrain for it as rent seck, under stat. 4 Geo. 2, c. 28, § 5? and if not, what remedy has he for the recovery of the rent? See —— v. *Cooper*, 2 Wils. 375, where it was held, that this statute does not extend to rents reserved on terms for years; assigning as a reason, that there cannot be a rent seck reserved on a term. H. J.

RENT.—BILL OF EXCHANGE.

If a bill of exchange be given in part payment of a distress for rent, and the bill is dishonoured, can the landlord again distrain, and can he prevent the tenant from removing his goods prior to the bill becoming due.

W. J. S. F.

MISCELLANEA.

GENTOO METHOD OF RECOVERING DEBTS.

If a creditor on the day appointed for payment, demands his money of the debtor, who refuses to discharge the debt, first, he shall speak to the friends and relations of the debtor, and procure them to demand payment; next, he shall go in person and importune for his money, and stay some time at the debtor's house, but without eating or drinking; if these means fail, he shall carry the debtor home with him, and having seated him before men of character and reputation, shall there detain him; if even this method should not succeed, he shall endeavour by feigned pretences to get hold of some of his goods; or if any pledge was deposited with him on lending the money, he shall carry the goods so pledged to the magistrate, who shall cause the deposit to be sold, and pay the creditor his debt, with interest, from the amount of the sale; if he cannot by evasive means distrain the debtor's goods, and also if no pledge be in his possession, he shall then seize and confine the debtor's wife, children, cattle, buffaloes, horses, and such kind of useful animals; also his pots, clothes, mats, and furniture; and seating himself at the debtor's door, shall there receive his money; if even these methods prove unsuccessful, he shall seize and bind the debtor's person, and procure by forcible means a discharge of the debt.

We have extracted this from *Halhed's Translation of Gentoo Laws*. The mode of proceeding seems very civil at first, but terminates with something worse than simple imprisonment; and we question whether the plan would be suitable for the recovery of *small* debts.

The Legal Observer.

VOL. IV. SATURDAY, AUGUST 25, 1832. No. XCVII.

> ——— "Quod magis ad nos
> Pertinet, et nescire malum est, agitamus."
> HORAT.

THE LORD CHANCELLOR, AND CHANCERY REFORM.

THE Lord Chancellor, on the last day but one of the session of Parliament just ended, brought forward his long promised plan for Chancery Reform. A part of it has already passed into a law, *viz.* that abolishing certain sinecure offices. The other portion we shall now shortly consider. As yet the bill is not before us, and we therefore take the account given of the measure by the noble Lord himself.

The first proposed enactment adverted to is the abolition of the Report Office; by which there will, it seems, be a reduction of 4000*l.* a year. In the next place, the Chancellor stated that considerable alterations are to be made in the Registrar's Office, (but he did not particularize them,) by which a saving of 14,000*l.* a year will be made. The march of Reform is at last, also, thank Heaven! to reach the Masters' Offices, by which a saving of 13,000*l.* a year will be effected. The Masters are no longer to be paid by fees. Copy money is also to cease, and gratuities no longer to be exacted. The Six Clerks' Offices, and the Subpœna Office, are not to be included in this bill, but are soon to be made subject to similar alterations. Now we have so repeatedly advocated these very changes, that we cannot but rejoice at the near approach to their being effected. The abolition of the useless offices and officers of the Court of Chancery, cannot but be advantageous to the practitioner and to the public. But these are not the only alterations which are contemplated. There are others, of even greater and more sweeping importance.

The first of these is the establishment of an efficient Court of Appeal from the Court of Chancery. There is in fact a most grievous deficiency in this respect in our present juridical system. The inconvenience, and absurdity, of the House of Lords as a Court of Appeal of this kind, have been so often shewn, that we shall not now advert to it. It has long been complained of, and called loudly for alteration. The plan proposed appears to us perhaps the best that could be devised. It is, that the Court of Appeal should be composed of the Lord Chancellor, the Master of the Rolls, the Vice Chancellor, and the Lord Chief Baron for the time being; but the Judge whose decision is to be appealed from, will, during the hearing of the case affecting his judgment, be excluded from the Court. The suitor may make his election, either to go to this Court or to the House of Lords; but he shall only be able to come from the Court of Appeal to the House of Lords, if there shall be a diversity of opinion as to his case amongst the Judges of the former Court. The House of Lords is also to have the same power of calling upon the Equity Judges for their assistance, as it indubitably has of calling upon that of the Common Law Judges.

The other great change contemplated by the Lord Chancellor is no other than the alteration of "that great, signal, and striking anomaly," that the highest Judge in civil matters under the Crown, is a Minister of the Crown, and is removable at the pleasure of the Crown, he being also, whether he will or not, a political character as well as a judicial one. This is what is proposed

to be altered; but the mode in which it is to be done does not appear to us clear, from the Lord Chancellor's statement. "I propose," said his Lordship, "merely to separate one great branch of the Lord Chancellor's judicial functions—I mean that branch in which he sits and acts as a Judge alone—from his other functions;—from his political functions, and from the functions which he discharges as Speaker of this House; from his function as Adviser of the Crown, and also from that other function incident to the Speakership of this House—I mean the judicial function in that appellate jurisdiction not exercised by the Lord Chancellor alone, but in conjunction with, and if need be, under the control and superintendence of a judicial character. If these functions be no longer united—if the Lord Chancellor shall be allowed to sit in this House under precisely the same circumstances as the other Judges, and in the Privy Council also;—when that important branch of appellate jurisdiction shall be new modelled by Parliament, as by an Act passed this session it is pledged to be—was to be rendered a useful and efficient Court,—then, my Lords, the great anomaly of which I complain will be removed, without any increase of patronage, and without a single shilling of additional burden to the public; for my opinion is, that the provision which has been made by Parliament for the sustentation of the office of Keeper of the Great Seal, is abundantly sufficient if well applied, to maintain in due dignity the Lord Chancellor as an officer of state, and as the Chief Judge, irremovable and purely judicial, in the High Court of Chancery."[a] Now if we understand this rightly, it is proposed to have a Lord Keeper — a purely judicial character — with 10,000*l.* a year, and a Speaker of the House of Lords, who is to be a Minister of the Crown, and the great legal adviser of the Government, with 4000*l.* If this be the plan, we think that strong and obvious difficulties and disadvantages attend it; but as we may be mistaken, we shall reserve the statement of them until the proposal receives a distinct shape.

One other alteration, comparatively insignificant, is also proposed. The Lord Chancellor, after shewing some of the advantages that had been obtained by the institution of the new Commissioners of Bankrupts, fairly admitted that the Court of Review is considerably underworked, and proposed, as a useful addition to their judicial labours, the connecting their jurisdiction with that of the Insolvent Debtors Court. We some time ago expressed an opinion that some alteration must be made in this Court; and we are happy to see that we were not singular in that opinion. It remains to be seen whether this new employment will sufficiently occupy their Honours. We shall lay the Bill before our readers at the earliest opportunity.

[a] Mirror of Parliament, p. 3715.

THE REGISTERING BARRISTERS UNDER THE REFORM ACT.

With the Reform Act, as a political measure, we have nothing to do. It will soon be put to the test, and we sincerely believe that it will be found to confer on the country many important advantages. There is, however, one part of the Act which relates peculiarly to our profession; and on this we think it proper to make a few remarks.

Our readers are all probably aware, that the lists to be prepared of the voters, both for counties and boroughs, are to be submitted to barristers, to be appointed for the several counties and boroughs, who are to decide on their validity. These barristers are to be appointed, if for London, Westminster, or Middlesex, by the Chief Justice of the King's Bench; and if for any other county or borough, by the senior Judges on the several Summer Assizes (2 W. 4. c. 45. § 49). The carrying into effect of this important measure, therefore, is entrusted to the registering barristers. To secure the proper discharge of this duty, the legislature has directed that every barrister should be paid at the rate of five guineas "*for every day*"[a] that he shall be employed, over and above his travelling and other expenses." § 57. And it is provided, that the barristers are to hold their courts for the purpose of registry between the 15th of September and the 25th of October, (§ 41.), which time, as it happens in the long vacation, it was not unreasonable to suppose would willingly be devoted, by competent men, to the duty. It has so happened, however, that by the Order in Council which settles the days for this

[a] By the Scotch Reform Act, the Sheriffs, who are to discharge the same duties for Scotland, are to work eight hours a day for their five guineas. 2 & 3 W 4. c. 65. § 41.

first and most important year, the time for completing the register is fixed to be held between the fifteenth of October and the twenty-ninth of November—thus cutting away the whole of Michaelmas Term. It is obvious, therefore, that barristers in much business cannot properly take the office for this year, as they must either sacrifice their business in town, or perform hastily and inefficiently their duties in the country. There are, no doubt, on every circuit, some men having some employment, and competent to discharge the duties of a registering barrister, who have little or no business in town, and who would therefore be willing to undertake the office; but they are certainly few. The selection made, therefore, if not all that could have been wished, is perhaps the best that could be formed under the circumstances. Many young men have certainly been appointed; and every Judge, we are inclined to think, if he has happened to have a nephew or cousin at the bar, has found room for him. A little jobbing, as usual, has crept in; but as a whole, the appointments have been proper.

Some difficulties have arisen in the construction of this part of the act. The first important question which was agitated was one of costume. Were the barristers to be gowned and wigged, or to trust to the unadorned simplicity of their usual attire? We believe it has been generally agreed that they shall sit in their robes. The next question was, where they were to sit?—it not being provided by the act that they are to have the town-halls, &c. This is still undetermined, some being desirous of obtaining these public places, and others preferring a room at an inn. If the proper steps be taken, it is not likely that there will be any difficulty in procuring the former. Another question is, whether, it being provided that "the parties shall not be attended by counsel," § 52, attorneys are admissible? We take it to be quite clear that they *are*. It has also been doubted whether the barrister has any power to commit for contempt or disturbance. This is certainly more doubtful; but as he has, for the purpose of settling all claims and objections, the same power, and may proceed in the same manner as the returning officer of any county, city, or borough, according to the laws and usages now observed at elections, § 52, we conceive he has this power, as it was certainly vested in a sheriff. We shall conclude these remarks by giving a list of the gentlemen appointed on some of the circuits. The appointments on the others we have not yet heard.

Oxford Circuit.

Berkshire. Mr. Corbett and the Hon. J. Talbot.
Oxfordshire. Mr. Tyrwhitt & Mr. Clive.
East Worcestershire. Mr. D. Maclean and Mr. Maddy.
West Worcestershire. Mr. Bather and Mr. Ward.
North Staffordshire. Mr. W. J. Alexander and Mr. Lumley.
South Staffordshire. Mr. Rumball and Mr. Stone.
North Shropshire. Mr. Secker and Mr. Chambers.
South Shropshire. Mr. C. Cooper and Mr. H. Peake.
Herefordshire. Mr. Shutt.
Monmouthshire. Mr. R. B. Chichester.
East Gloucestershire. Mr. Egerton and Mr. E. White.
West Gloucestershire. Mr. Swabey.

Norfolk Circuit.

Norwich and Yarmouth. Mr. Elmsly and Mr. Collyer.
East Norfolk. Mr. Abbot & Mr. Bayley.
West Norfolk. Mr. Hunt & Mr. Bylcs.
East Suffolk and Ipswich. Mr. Preston and Mr. H. J. Perry.
West Suffolk. Mr. Evans & Mr. Maltby.
Bedfordshire. Mr. Austin & Mr. Rose.
Huntingdonshire. Mr. Gordon and Mr. Burch.

North Wales Circuit.

Anglesea. Mr. John Jervis.
Carnarvonshire. Mr. Younge and Mr. Welsby.
Denbighshire. Mr. Loxdale.
Flintshire. Mr. Lewis.
Merionethshire. Mr. J. H. Lloyd.
Montgomeryshire. Mr. Keeson and Mr. Winslow.
Cheshire. Mr. J. Williams, Mr. Barlow, and Mr. Moylan.

South Wales Circuit.

Glamorganshire. Mr. Wilson and Mr. E. V. Williams.
Carmarthenshire. Mr. Chilton and Mr. Whitcombe.
Cardiganshire. Mr. Sockett & Mr. Leach.
Pembrokeshire. Mr. Sockett and Mr. H. Jones.
Breconshire and Radnorshire. Mr. John Evans and Mr. Wedgwood.

Western Circuit.

North Hampshire. Mr. Taunton and Mr. Warry.

South Hampshire. Mr. Gambier and Mr. Inman.

Newport. Mr. Manning.

North Wiltshire. Mr. Rowe, Mr. Missing, and Mr. Saunders.

South Wilts. Mr. Oxenham and Mr. Elliott.

Dorset. Mr. Halcombe, Mr. Sewell, and Mr. Bere.

North Devon. Mr. Villiers and Mr. Gunning.

South Devon. Mr. Rogers, Mr. Jardine, and Mr. Gaselee.

East Cornwall. Mr. Graves and Mr. Slade.

West Cornwall. Mr. H. Jeremy and Mr. G. Brown.

East Somerset. Mr. Smirke, Mr. Wake, and Mr. Coleridge.

West Somerset. Mr. Penruddocke and Mr. Cockburn.

GRIEVANCES OF THE PROFESSION.

POLL-TAX ON ATTORNEYS AND SOLICITORS.

THE supineness of the members of the profession, *as a body*, to their immediate and personal interests, has often been remarked. Each individual leaves it to others to take care of the general welfare; and thus it is altogether neglected. Private interests are best promoted by individual attention; but there are many occasions on which it is necessary for the whole body to unite, or nothing can be effected. The remonstrance or the application of one man, makes no impression. The answer in Parliament would naturally be, "If the grievance were very general, we should hear general complaints: here is but one. There cannot, therefore, be much evil to remove; and, as we have more pressing matters to attend to, let the petition lie on the table,"—which is a civil form of paying no attention to it.

Amongst this class of grievances of the profession, is the tax on attorneys and solicitors for an annual certificate. Some of the solicitors of Ireland have recently taken the subject up, and presented a petition to the House of Commons; but they have not rested their claim altogether on the general grounds applicable to the whole profession, which we think they ought to have done. They begin, however, very properly, as follows:

"They protest against a *capitation* tax, as being in principle unjust, oppressive, and partial—as placing the attorney (solely depending upon the emoluments of his profession) and one of thousands, in the same level as to taxation—as making the poor man pay as much as the rich, with means quite unequal—as adding to the weight of legislative enactments to crush the poor man, already oppressed by poverty."

They also state that it is a tax especially galling to the solicitors of Ireland, and they contend, as a peculiar hardship—

"That the tax, as regarding the petitioners, is an *ex post facto* law, and entirely retrospective, inasmuch as there never had been any tax or duty whatsoever imposed upon attorneys and solicitors practising in the Irish Courts of Law from time immemorial, nor had any such tax ever been contemplated by the Parliament of Ireland. The Petitioners, therefore, who had selected their profession on the faith of being subject to no professional tax, are treated with manifest injustice, as the tax was imposed when they were in fact fixed to the profession, by monies laid out in apprentice fees, and other heavy expenses incident to their admission and apprenticeship."

We do not precisely distinguish the greater hardship of the case of the Irish solicitors, compared with that of the English. The intentions of the Irish Parliament, which ceased upwards of thirty years ago, can bear but little on the present race of practitioners. The present generation can scarcely enter into a question of implied contract before the Irish Union. Nor is it necessary: the argument, as applicable to the whole body of solicitors, is sufficiently strong, and more to be depended upon.

The petitioners, also, represent that the tax originated as a war tax; and they contend, that when the war ceased, the tax should in justice have been discontinued. We fear, however, that this ground of alteration will be met by the statement, that the abolition of so many other taxes may be required for the same reason, that compliance is impossible.

It is next urged, that the pretended ground for the tax, as "tending to prevent improper or disreputable persons from embracing the profession," does not apply to the petitioners who had previously entered into it. This again is putting the question upon a personal ground, which can be tenable only by a small portion of practitioners. The number of persons who entered the profession *before* the duty was imposed, must be inconsiderable, compared with those who entered it subsequently.

The following point is of a general nature.

"That as by various enactments of the legislature since 1816, the profits and income of

the profession have been considerably contracted, it is but fair and just that a tax imposed upon their profession, having been upon income of which they have been since deprived, should be discontinued."

The main objection to the tax is, however, that it is unequal and unjust;—unequal, as it makes each individual pay the same amount, without reference to the extent of his property or income;—and unjust, as it is imposed upon a particular class of persons, and not on the community in general. Neither the clergy, the faculty, nor any other class, are prevented from exercising their calling unless they pay a considerable annual sum. The notion that "improper and disreputable persons will be kept out of the profession by such a burden," is in the highest degree absurd. Those who are disreputable will indemnify themselves for the exaction at the expense of society, and it will often fall the heaviest upon those who are the most honorable and prudent. In every view, the tax is unjustifiable, and the profession ought to unite to procure its abolition.

LAWS OF FRANCE.

LOCAL MAGISTRATES.

It may be interesting to our readers to notice the nature and extent of the powers exercised by the local magistrates in France. It will be observed that the late Local Court Bill, in regard to Arbitration, Reconcilement, &c. much resembled the existing practice in France; but it appears that it is only in the villages that this part of the system is found useful. In large cities, particularly in Paris, where the *Juges de Paix* have less influence over the parties, its advantages are less known and appreciated. The plan will never succeed in England.

According to Mr. Okey's book, a Tribunal of *Justice de Paix* is established in every canton, for the summary decision of all cases in which the cause of difference is of trifling importance.

The duties of the *Juges de Paix* may be divided into judicial, conciliatory, and extra-judicial. As a magistrate, he decides the cases over which the law has given him cognizance; as a mediator, he hears the complaints of the parties, seeks to adjust them amicably, and recommends the submission of the differences to arbitrators of their own choice; in his extra-judicial capacity, he affords acts of notoriety in cases of marriage, he presides at *conseils de famille*, affixes seals, demands the admission of the officer in arrest, seizure, and cases of a like nature.

The duties of the *Juge de Paix* also extend to the repression of many of the offences against the police laws.

The *Juge de Paix* has jurisdiction in all personal actions to the amount of 50 francs without appeal, and to that of 100 francs, subject to appeal. The demand, and not the sum which is awarded, determines the jurisdiction of the *Juge de Paix*. Thus, when 100 francs are demanded, although 50 only are awarded, or when the *Juges de Paix* directs the payment of many sums, each of which may be below 100 francs, although in the whole they exceed that sum, the judgment is open to appeal.

Parties may at all times apply to a *Juge de Paix*, who, upon their appearing before him, will decide their differences, either absolutely, if the law and the parties authorise and consent to his so doing, or subject to appeal. The declaration of the parties, and their request to this effect, must be signed by them.

The *Juges de Paix* hold their sittings at least twice a week, and may, if required, sit every day, without excepting Sundays and *fête* days; they are likewise empowered to hold sittings at their own houses, and that even with closed doors, in cases where the evidence likely to be elicited is considered by them improper for publicity; but they are accountable for so doing to the *Procureur du Roi*, to whom they must assign their motives.

The parties or their representatives are heard before the Judge and in presence of each other; the case is decided either summarily or at the following sitting, as the Judge thinks proper; the presence of the parties not being necessary at the judgment.

The summons (*citation*) before the *Juge de Paix* must set out the day, month, and year; the names, profession, and domicile of the complainant; the names, abode, and competency or registry of the *huissier*, with the names and abode of the defendant, the cause of complaint, the *Juge de Paix* who is to take cognizance of it, and the day and hour at which appearance is required.

In all complaints relating to the person or to personal property, the summons must be before the Judge of *the defendant's domicile*; and should he have no domicile, then before the Judge of his place of residence. If the debtor, however, is summoned before the Judge of his residence, and he should have a domicile, although unknown to the complainant, the former may demand the removal of the complaint before the Judge of his domicile.

The summons is served on the party by the *huissier* of the *Juge de Paix* of the defendant's domicile, or by a person specially appointed for that purpose by the *Juge de Paix*: a copy is left with the party, or should no one be found at his domicile, the copy may then be left with the mayor or *adjoint* of the *commune*.

If the party summoned is domiciled at three *myriamètres* (or six leagues) distance, there must be at least one day allowed between the service of the summons and the party's appearance; if domiciled beyond that distance, one day is allowed for every three *myriamètres*; and unless the time allowed be strictly attended to, the *Juge de Paix*, upon

the failure of defendant's appearance, will order him to be resummoned; and the expense of the first summons, with costs, to be paid by the complainant.

In cases of urgency the *Juge de Paix* has the power to abridge the periods above-mentioned, and to order the appearance of the defendant the day and hour mentioned in the summons. If one of the parties fail to appear on the day mentioned in the summons, except it be in case where a re-summons has become necessary, as above noticed, the case is decided by default. If both parties appear, but the party summoned refuse to defend himself, this is taken as a tacit acknowledgment of the justice of the complaint, unless time is asked for the production of some document necessary for the defence, when a given time will be allowed.

When judgment by default has gone against a party summoned, he may, within three days from the service of the summons by the *huissier* or other person appointed by the *Juge de Paix*, signify his opposition to it; and this is considered a more respectful mode than by appeal, as it merely requires of the same Judge the revisal of his decision. The act of opposition must contain the party's defence, the summons to the next sitting of the Judge, with the usual allowance of time upon summons, the day and hour of appearance, and must be served as in the cases above-mentioned. A second default will not entitle a party to again oppose the judgment.

The decisions of *Juges de Paix* to the amount of 300 francs may be executed conditionally, notwithstanding appeal; and, in other cases, *Juges de Paix* may order the conditional execution of their judgment, the party requiring it giving security. Thus if a fine has been adjudged to be paid, the revisal of the decision upon appeal will order the return of it; or if imprisonment has been the consequence, the party's remedy is against the *Juge de Paix*, should his decision have been the result of personal interest or feelings, and not dictated by the justice of the case.

Appeals from the decisions of *Juges de Paix*, and which are to the *Tribunal de Première Instance*, must be entered within three months from the date of the summons by the *huissier* or other person appointed by the *Juge de Paix* for the service of process.

PARLIAMENTARY NOTICES RELATING TO THE LAW, FOR THE NEXT SESSION.

PALACE COURT.

Motion by Mr. Hunt, for a return of the Names and Emoluments of the Judges, whether Principals or Deputies of the Court of King's Palace at Westminster, held in Great Scotland Yard:—Also, the Names of the Four Counsel and the Six Attorneys who claim an exclusive right to practise in that Court:—Also, of all other officers of the said Court, from the Lord Steward of the Household down to the Bailiffs who serve the Writs and other Process, with the amount of each of their Salaries and Emoluments.

BUILDINGS AND PARTY-WALLS.

Motion by Mr. Hughes Hughes, for leave to bring in a Bill for the regulation of Buildings and Party-walls, and for preventing mischiefs by Fire, and injuries to the lives and property of his Majesty's subjects from the injudicious construction of Buildings.

COUNSEL FOR PRISONERS.

Motion by Mr. Ewart, to allow Prisoners in Criminal Cases a full defence by Counsel.

LAW OF EVIDENCE.

Motion by Mr. O'Connell, for leave to bring in a Bill to abolish all objections to Witnesses on the ground of Interest, and to enable the Parties in Suits to be examined as Witnesses.

CHANCERY OFFICES.

Motion by Mr. Harvey, for an Inquiry into the State and Practice of the Offices of the Masters in Chancery, the Six Clerks, and the Registrars, with a view to a cheaper and more efficient system for the dispatch of business in that Court.

COURT OF CHANCERY.

Motion by Sir Edward Sugden, to bring before the House the consideration of the Administration of Justice in the Court of Chancery.

BANKRUPTCY COURT OF REVIEW.

Motion by Sir Edward Sugden, to refer to a Select Committee the Act establishing the Court of Review in Bankruptcy.

PAROCHIAL REGISTRIES.

Motion by Mr. Wilks, for a Select Committee to consider the general state of Parochial Registries, and the Laws relating to those Registries, and the Registration of Births, Marriages, Deaths, and Burials, in England and Wales.

PUNISHMENT OF DEATH.

Motion by Mr. Henry Lytton Bulwer, for a Committee to consider the possibility of abolishing the Punishment of Death.

SELECTIONS FROM CORRESPONDENCE.

No. XI.

ABRIDGMENT OF THE LONG VACATION BY ONE OF THE MASTERS IN CHANCERY.

To the Editor of the Legal Observer.

Sir,

I have read your remarks on the Long Vacation with great pleasure. They are refreshing to the wearied practitioner, and quite in har-

mony with my notions, and I believe with those of professional men in general. There may be here and there a man making haste to obtain riches which he can never rationally enjoy, who may begrudge the relaxation conveniently provided by ancient usage; but these are only exceptions. The mind as well as the body requires change and repose, and this is the season of the year when they can be obtained more beneficially than at any other time. "The duties of life (says the Lord Chancellor) are more than life;" but even he is compelled, if he be not willing, to withdraw from the severity of his labors.

Nor can I agree with those who contend that the doors of all the Courts of Justice should be open throughout the year. Some pause should be allowed to litigation—some time for reflection to the plaintiff—and a few weeks grace to the defendant. The administration of justice may well be effected in the course of eight or nine months in the year; and I much question whether it is not better to allow a *long* vacation at this season, than to abridge it, and extend the duration of the others. To keep the legal ploughshare eternally in motion, is equally needless and inconvenient.

I know not whether the determination of one of the Masters, to continue his sittings during the vacation, be designed to court popularity, at the expense of the convenience of the practitioners. I know he is much esteemed, and that he is an able judge. He was always distinguished at the Bar for his urbanity; and I should regret to find that he persisted in a course which no other Master has considered necessary, either in the same or any other Court. Perhaps, however, the few cases in which I understand he is proceeding, are of a peculiar nature; but in that case the Court should have been applied to. There may be many others of equal importance; and the same measure of justice should be meted to all the suitors. The same rule should prevail in all the offices: one man should not be harrassed, and another benefited, by the accidental circumstance of the cause being referred to a particular Master.

These are the general grounds of objection which apply to both branches of the profession; but there are others, of no small importance. This is the only time of the year when solicitors are enabled to prepare their bills of costs and accounts, which, it must be admitted, are as essential for the satisfaction of their clients, as necessary for their own interests.

I add no more at present, but shall revert to the subject, if I find it necessary.

I am, Sir,
Your obedient servant,
K.

ARTICLED CLERKS.

Sir,

Permit me, through the medium of the Legal Observer, to offer a few remarks on the hours which an articled clerk should be expected to attend at the office of his principal.

The subject may, perhaps, at first appear of little or no importance; but upon consideration, I think every unprejudiced mind will agree with me in saying, that it is highly necessary, for the interest of the principal as well as the clerk, that some general rule should be laid down by which the hours of an articled clerk's attendance should be regulated.

In many offices within my own personal knowlege, articled clerks, even now, during the long vacation, are required to remain at the office until eight o'clock, and frequently much later. Now, Sir, I submit, at this season of the year, when a press of business cannot be pleaded as a palliation, that articled clerks should not remain, at any rate, after seven o'clock, except in cases of particular emergency. But the subject does not wholly rest with articled clerks: I cannot but think it as contrary to reason that any clerk, at this season of the year, when air and exercise are so highly essential to health, independently of time for reading and reflection, should be compelled to remain at the desk until eight, or perhaps nine o'clock. Why should so vast a difference exist between the legal and the mercantile clerk?—the latter of whom is now rarely occupied after five.

In conclusion, I would say, that although I must assert that much injustice is in this respect done to a vast body of individuals, still I trust that when the interests of his employer required his services, the personal convenience of the clerk should not be placed in the scale. My remarks only allude to times when there is no particular press of business, and when there can be no reasonable excuse for enforcing so rigid and laborious a service.

Hoping these remarks will lead to some consideration of the subject,

I am, Sir,
Yours most respectfully,
AN ARTICLED CLERK.

REMARKABLE TRIALS.

No. XIII.

CASE OF COWPER, MARSON, STEVENS, AND ROGERS, FOR MURDER.

[This trial took place on the 18th July, 1699, at the Hertford Assizes. Mr. Cowper was a barrister, in good practice, and much esteemed. The other three defendants were attorneys. The evidence being of great length, we can give only some of the prominent parts; the opening speech of the counsel for the prosecution, and Mr. Cowper's defence, which he conducted personally with great self possession

and acuteness, will enable the reader to understand all the points of the case.]

The following is the substance of the Indictment:

That on the 13th March, 1699, the prisoners "did kill and murder one Sarah Stout, spinster, by tying a rope about the neck and throat of the said Sarah, and after which threw her into the Priory River at Hertford, in order to conceal the said Sarah Stout."

The defendants having pleaded *Not Guilty*, and the jury being sworn, the counsel for the King proceeded as follows:

Mr. *Jones.*—May it please your lordship, and you gentlemen that are sworn, I am of counsel for the King in this cause, and it is upon an indictment by which the gentlemen at the bar stand accused, for one of the foulest and most wicked crimes almost that any age can remember. I believe in your county you never knew a fact of this nature. For here is a young gentlewoman of this county murdered and strangled in the night-time. The thing was done in the dark, therefore the evidence cannot be so plain as otherwise might be.

After she was strangled and murdered, she was carried and thrown into a river, to stifle the fact, and to make it supposed that she had murdered herself; that it was indeed, if it prove otherwise, a double murder, and a murder accompanied with all the circumstances of wickedness and villainy that I remember in all my practice, or ever read of.[a]

The fact, as it was committed in the night-time, so it was carried very secret; and it is very well we have had so much light as we have to give so much satisfaction: for we have here, in a manner, two trials, one to acquit the party that is dead, and to satisfy the world, and vindicate her reputation, that she did not murder herself, but was murdered by other hands. For my part, I shall never, counsel in the case of blood, aggravate; I will not improve or enlarge the evidence at all; it shall be only my business to set the fact as it is, and to give the evidence, and state it as it stands here in my instructions.

My Lord, for that purpose, to lead to the fact, it will be necessary to inform you, that upon Monday, the thirteenth of March, the first day of the last assizes here, Mr. Cowper, one of the gentlemen at the bar, came to this town, and lighted at Mr. Barefoot's house, and stayed there some time, I suppose to dry himself, the weather being dirty, but sent his horse to Mrs. Stout's, the mother of this gentlewoman. Some time after he came thither himself, and dined there, and staid till four in the afternoon: at four, when he went away, he told them he would come and lodge there that night and sup.

According to his word he came there, and had the supper he desired; after supper, Mrs. Stout, the young gentlewoman, and he, sat together till near eleven o'clock. At eleven o'clock there were orders given to warm his bed, openly to warm his bed, in his hearing. The maid of the house, gentlemen, upon this, went up stairs to warm his bed, expecting the gentleman would have come up and followed her before she had done; but it seems, while she was warming of the bed she heard the door clap together, and the nature of that door was such, that it made a great noise at the clapping of it too, that any body in the house may be sensible of any one going out. The maid, upon this, was concerned, and wondered at the meaning of it, he promising to lie there that night; she came down; but there was neither Mr. Cowper nor Mrs. Stout; so that we suppose, and for all that we can find and learn, they must go together. After their going out, the maid and mother came into the room, and the young gentlewoman not returning, nor Mr. Cowper, they sat up all night, in the house, expecting what time the young gentlewoman would return. The next morning, after they had set up all night, the first news of this lady was, that she lay floating and swimming in the water, by the mill-dam. Upon that, there were several persons called, for it was a surprise how this should come to pass. She lay floating, with her petticoats and apron, but her night-rail and morning-gown were off, and one of them not found till some time after; and the maid will give you an account how it came to be found.

This made a great noise in the country; for it was very extraordinary; it happening, that from the time the maid left Mr. Cowper and this young gentlewoman together, she was not seen or heard of till next morning, when she was found in this condition, with her eyes broad open, floating upon the water.

When her body came to be viewed, it was very much wondered at; for, in the first place, it is contrary to nature, that persons who drown themselves should float upon the water. We have sufficient evidence that it is a thing that never was. If persons come alive into the water, then they sink; if dead, they swim. That made some more curious to look into this matter. At first it was thought that such an accident might happen, though they could not imagine any cause for this woman to do so, who had so great prosperity, had so good an estate, and had no occasion to do an action upon herself so barbarous, nor cannot learn what reason she had to induce her to such a thing. Upon view of the body, it did appear, there had been violence used to the woman; there was a crease round her neck, she was bruised about her ear, so that it did seem as if she had been strangled, either by hands or a rope.

Gentlemen, upon the examination of this matter, it was wondered how this matter came about; it was dark and blind. The coroner at that time, nor these people, had no evidence given, but the ordinary evidence; and it passed in a day. We must call our witnesses to this fact, that of necessity you must conclude she

[a] This is rather inconsistent with the learned gentleman's subsequent declaration, that "in a case of blood" he would never *aggravate*.

was strangled, and did not drown herself: If we give you as strong a proof as can be upon the nature of the fact, that she was strangled, then the second matter under your enquiry will be, to know who or what persons should be the men that did the fact. I told you before, it was, as all wicked actions are, a matter of darkness, and done in secret, to be kept as much from the knowledge of men as possible.

Truly, gentlemen, as to the persons at the bar, the evidence of the fact will be very short, and will be to this purpose.

Mr. Cowper was the last man, unfortunately, in her company; I could wish he had not been so with all my heart; 'tis a very unfortunate thing that his name should, upon this occasion, be brought upon the stage; but then my Lord, it was a strange thing, here happens to be three gentlemen, Mr. Marson, Mr. Rogers, and Mr. Stevens. As to these three men, my Lord, I don't hear of any business they had here, unless it was to do this matter, to serve some interest or friend that sent them upon this message: for, my Lord, these persons, Mr. Stevens, Mr. Rogers, and Mr. Marson came to town here on the thirteenth of March last, the assize-day: my Lord, when they came to town, they came to an house, and took lodgings at one Gurrey's, they took a bed for two, and went out of their lodging, having taken a room with a large bed in it, and afterwards they went to the Glove and Dolphin, and then, about eight o'clock, one Marson came to them there; in what company they came, your Lordship and the jury will know by and by. They staid there, my Lord, at the Glove, from eight o'clock to eleven, as they say. At eleven, these three gentlemen came all into their lodging together to this Gurrey's; my Lord, when they came in, it was very observable amongst them, unless there had been a sort of fate in it, first, that they should happen to be in the condition they were in; and secondly, fall upon the discourse they did at that time: for, my Lord, they called for fire, and the fire was made for them; and while the people of the house were going about, they observed and heard these gentlemen talk of Mrs. Sarah Stout; that happened to be their discourse: one said to the other, "Marson, she was an old sweetheart of yours:" "ay, saith he, but she cast me off; but I reckon by this time a friend of mine has done her business." Another piece of discourse was, "I believe a friend of mine is even with her by this time." They had a bundle of linen with them; but what it was is not known; and one takes the bundle, and throws it upon the bed, *Well*, saith he, *her business is done; Mrs. Sarah Stout's courting days are over;* and they sent for wine, my Lord; so after they had drank of the wine they talked of it, and one pulled out a great deal of money; saith one to another, *What money have you spent to day?* saith the other, *Thou hast had forty or fifty pounds for thy share:* saith the other, *I will spend all the money I have, for joy the business is done.*

My Lord, this discourse happened to be among them, which made the people of the house consider and bethink themselves, when the next day they heard of this Mrs. Stout's being found in the water, this made them recollect and call to mind all these discourses.

My Lord, after these gentlemen had staid there all night, next morning truly, it was observed (and I suppose some account will be given of it) that Mr. Cowper and they met together, and had several discourses, and that very day went out of town, and I think, as soon as they came to Hoddesdon, made it all their discourse and business to talk of Mrs. Stout.

My Lord, we will call our witnesses, and prove all these facts that I have opened to your Lordship; and then I hope they will be put to give you some account how all these matters came about.

Call Sarah Walker (who was sworn).

Sarah Walker.—On Friday before the last assizes, Mr. Cowper's wife sent a letter to Mrs. Stout, that she might expect Mr. Cowper at the assize time; and therefore we expected Mr. Cowper at that time and accordingly provided; and as he came in with the Judge, she asked him if he would alight; he said, no; by reason I come in later than usual, I will go into the town and shew myself; but he would send his horse presently. She asked, how long it would be before he would come? because they would stay for him; he said, he could not tell; but he would send her word; and she thought he had forgot, and sent me down to know whether he would please to come; he said he had business, and he could not come just then; but he came in less than a quarter of an hour after, and dined there; and he went away at four o'clock; and then my mistress asked him, if he would lie there? and he answered, Yes; and he came at night about nine o'clock, and he sat talking about half an hour, and then called for pen, ink, and paper, for that, as he said, he was to write to his wife, which was brought him, and he wrote a letter, and then my mistress went and asked him, what he would have for supper? he said milk, by reason he had made a good dinner; and I got him his supper, and he eat it; after, she called me in again, and they were talking together, and then she bid me make a fire in his chamber, and when I had done so, I came and told him of it, and he looked at me, and made me no answer; then she bid me warm the bed, which accordingly I went up to do as the clock struck eleven, and in about a quarter of an hour I heard the door shut[a], and I thought he was gone to carry the letter, and staid about a quarter of an hour longer, and came down, and he and she was gone; and Mrs. Stout, the mother, asked me the reason why he went out when I was warming his bed? and she asked me for my mistress; and I told her I left her with Mr. Cowper, and I never saw her after that, nor did Mr. Cowper return to the house.

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[a] The precise time was important, in reference to the defence.

Mr. *Cowper*.—Pray will you recollect a little, and be very particular as to the time when I went out at night.

Walker.—Sir, it was a quarter after eleven by our clock; the difference between the town clock and our's, was half an hour.

Mr. *Cowper*.—But you say, by your clock, it was a quarter after eleven.

Walker.—Yes, Sir.

Mr. Baron *Hatsell*.—Which clock was earliest, your's or the town clock.

Walker.—Our's was half an hour faster than theirs.

Mr. *Jones*.—So then it wanted a quarter of eleven by the town clock.

Mr. *Cowper*.—Pray, Mrs. Walker, did you never take notice that your mistress was under melancholy?

Walker.—I don't say but she was melancholy: she was ill for some time, and I imputed it to her illness, and I know no other cause.

Mr. *Cowper*.—Have you not often told people that your mistress was a melancholy person, upon your oath?

Walker.—I have said she hath been ill, and that made her melancholy.

Evidence was then given by several witnesses, of the state in which the body of the deceased was found. It was in substance as follows:—part of the clothes were above the water, but the statements were contradictory as to part of the body being also above the water. The majority, however, said she was under the water. Her head and one arm was between the stakes which were driven into the bed of the river. No bruises were perceived on the body. It was not swelled with water. Her stays were laced. Some froth came from the mouth and nostrils. The teeth were clenched fast. The eyes were open.

The body was disinterred six weeks afterwards, to refute a report that the deceased was pregnant, and a negative was clearly established. Several physicians and surgeons were present at the opening of the body, and concurred in opinion that the deceased had not been drowned, *because there had been no water in the body, for if there had been it must have produced putrefaction*[b].

It was also proved that Mr. Cowper quitted the town after the death was known, without calling on the mother of the deceased, with whom he was intimately acquainted, but sending another person for his horse.

Witnesses were then called to prove the expressions used at the inn by the other prisoners, as stated in the opening speech, but nothing farther was established against them.

[*To be continued.*]

[b] Some appearances of settlement of blood at the ear and other parts were deposed to; but this evidence *after* the disinterment, was opposed to the testimony of the previous state of the body.

SUPERIOR COURTS.

COURT OF KING'S BENCH.

[Before the Four Judges.]

TAXATION OF COSTS.—ATTORNEY'S BILL.—JURISDICTION.

Where an attorney's bills are referred for taxation to the prothonotary of the C. P., he may refer items for business done in the K. B. to be taxed by the master of the latter Court; and the K. B. has no jurisdiction to interfere with that taxation of the master; nor is the prothonotary bound by it.

Justice obtained a rule for reviewing the master's taxation, under these circumstances: The Court of Common Pleas had referred several bills of an attorney to the prothonotary for taxation. Among the *items* charged in those bills, was business done in the Court of King's Bench. When the prothonotary, in the course of his taxation, arrived at these items, he referred them to the master of this Court. The master allowed certain of those items, to which objection was now made.

V. Richards appeared to shew cause; and contended, that this Court had no jurisdiction to interfere in such a case. The sending those *items* by the prothonotary to the master, was a mere matter of arrangement between those two officers; and the prothonotary was not bound by the master's mode of dealing with those *items*.

Per Curiam.—The Court certainly has no jurisdiction to interfere in this case.

Rule discharged, with costs.—*In re Jones*, May 26th, 1832. K. B. F. J.

HABEAS CORPUS.—WAIVER OF BAIL.—RULE TO PLEAD.

Where a cause is removed from an inferior jurisdiction by habeas corpus, and the plaintiff declares conditionally before special bail perfected, and indorses a demand of plea on his declaration, according to R. 43. 1 Reg. Gen. H. T. 2 W. 4., special bail is waived.

An action was commenced in the Palace Court, and removed by *habeas corpus* into the King's Bench. Before the *habeas corpus* was returned, and bail perfected by the defendant, the plaintiff delivered his declaration in this Court, indorsed conditionally, until bail should be put in and perfected; but also added on the declaration, a demand of plea, according to Rule 43 of 1 Reg. Gen. H. T. 2 W. 4.[a] The defendant considering the demand of plea as a waiver of special bail, filed common bail, and pleaded the general issue to the declaration. After he had filed common bail, but before the plaintiff's attorney knew of the fact, the latter gave notice to the defendant that the demand of plea was a mistake of his clerk,

[a] 1 Dowl. Prac. Rep. 188.

and therefore waived it. He then ruled the defendant to put in bail. This rule Mr. Justice *Taunton*, by order at chambers, set aside, conceiving that the defendant was right. A rule to set aside this order having been obtained,

Kelly shewed cause, and

Campbell and *Erle* supported the rule.

Per Curiam.—The defendant was right in filing common bail. The plaintiff could not, under such circumstances, abandon his demand of plea. The rule to set aside Mr. Justice *Taunton's* order must therefore be discharged.

Rule discharged.—*Law* v. *Stevens*. May 26th, 1832. K. B. F. J.

KING'S BENCH.—PRACTICE COURT.

JUDGMENT AS IN CASE OF A NONSUIT.—COSTS OF THE DAY.

Rule 69. of 1 Reg. Gen. H. T. 2 W. 4. does not enable the Court, where a rule for judgment as in case of a nonsuit, for not proceeding to trial, is made absolute, to grant the defendant the costs of the day, on disposing of that motion.

Burke made a rule absolute for judgment as in case of a nonsuit, for not proceeding to trial pursuant to notice. He then applied for the costs of the day, under rule 69 of 1 Reg. Gen. H. T. 2 W. 4.[a], as a consequence of the rule being so disposed of by the Court.

Taunton, J.—Those costs must be made the subject of a separate motion. The rule which you have cited only applies to cases where the rule is discharged.

Costs refused.—*Johnson* v. *Smith*. May 12th, 1832. K. B. P. C.

ATTACHMENT.—SHERIFF.

An affidavit to set aside a regular attachment against the sheriff, on payment of costs, must state that the application is made for the indemnity only, at the expense of the sheriff.

Channel shewed cause against a rule for setting aside an attachment against the sheriff, on payment of costs. The affidavit on which the application was founded, does not state that the application is made for the indemnity of the sheriff only, and at his expense. The rule of court is, that "no rule can be drawn up for setting aside an attachment regularly obtained against a sheriff for not bringing in the body, unless the application for such rule, if made on the part of the original defendant, be grounded upon an affidavit of merits; or, if made on the part of the sheriff, or bail, or any officer of the sheriff, be grounded upon an affidavit shewing that such application is really and truly made on the part of the sheriff, or bail, or officer of the sheriff (as the case may be), at his or their own expense, and for his or their only indemnity, and without collusion with the original defendant[a]." These requisites not having been complied with, the rule must be discharged.

Taunton, J.—The affidavit does not comply with the rule of court, and is therefore insufficient. The rule must not be frittered away.

Rule discharged.—*Rex* v. *The Sheriff of Middlesex*. May 12th, 1832. K. B. P. C.

[a] 1 Dowl. Prac. Rep. 192.

WRIT OF ERROR.—VARIANCE.

Where there is a variance in the description of the form of action, between the note in the allowance of a writ of error and the record, the plaintiff may sue out execution notwithstanding the writ.

Channel shewed cause against a rule, which required the defendant to shew cause why the plaintiff should not be at liberty to sue out execution, notwithstanding a writ of error, brought on the ground that the action was in *replevin*, and the note of allowance of the writ was in *trespass*. He submitted, that an exact statement of the form of action was not material: as in every case where *replevin* was brought, *trespass* might be brought also.

Taunton, J.—They are materially different.

Rule absolute.—*Hills* v. *Spilsbury*, May 12th, 1832, K. B. P. C.

SERVICE OF PROCESS.—ATTORNEY.

Service of a rule on an attorney, by leaving it with a laundress at his chambers, who stated that she was authorised to receive notices and papers for him, is insufficient.

Butt moved to make a rule absolute, on an affidavit of service. The defendant was an attorney, and the rule was left with a laundress at the chambers, she stating that she was authorised to receive notices and papers for the defendant.

Taunton, J.—That will not do.

Rule refused.—*Dodd* v. *Drummond, Gent., one, &c.* May 5th, 1832.

BAIL.—COSTS OF OPPOSITION.

The costs of opposing bail, who have complied with R. 3, T. T. 1 W. 4, but are rejected, are granted as a matter of course to the plaintiff, unless some very strong ground is shewn, on the part of the defendant, for putting in bail who could not justify.

Comyn opposed bail successfully, and applied for the costs of opposition as a matter of course, under R. 3, T. T. 1 W. 4.

Platt, on the part of the defendant, submitted, that the granting the costs of opposition was not a matter of course, but discre-

[a] 1 Tid. Prac. 316, ed. 9.

tionary with the Judge before whom the bail appeared.

Taunton, J.—It is a matter of course, unless there are very strong circumstances shewn on the other side.

Costs granted.—*Evans's Bail*, May 8th, 1832. K. B. P. C.

VARIANCE.—DECLARATION.—WAIVER.

A variance between the description of the form of action stated in the notice of declaration, and in the declaration itself, is an irregularity; but is waived by the defendant taking the declaration out of the office.

N. Clarke shewed cause why the notice of declaration filed in this case should not be set aside, on the ground that the notice of declaration was of a plea "trespass on the case," and the declaration was in "trespass." That would undoubtedly be an irregularity; but the defendant has waived it, by taking the declaration out of the office. It may be said, that the defendant could not become acquainted with the irregularity without taking the declaration out of the office; but the fact is otherwise. The defendant, if he chooses to enquire of the clerk of the declarations, will be informed of what the nature of the action stated in the declaration is. As, therefore, he has an opportunity of becoming acquainted with the irregularity without taking out the declaration, he has waived it by taking it out. This principle is recognized in *Gilbert* v. *Kirkland*[a], which is a case extremely similar to the present. There it was held, that when a plaintiff had declared conditionally, after the time for the defendant's appearing had expired, and the defendant took the declaration out of the office, it was a waiver of the irregularity. Mr. Justice *Parke* there said, "I have enquired into the practice of the office, and find that the defendant has an opportunity of seeing the exterior of the declaration. Now, he could have seen by the indorsement, if it were filed conditionally, and therefore, taking the declaration out of the office, after an opportunity of seeing that indorsement, was a waiver." In point of principle there is no distinction between that case and the present; and therefore the present rule must be discharged.

Alexander, *contrà*, contended, that taking the declaration out of the office was no waiver, because the defendant had not an opportunity of seeing it before he took it out. The mere courtesy of the clerk of the declarations, in telling the defendant the nature of the action stated in the declaration, if he happened to ask the question, could not be considered a waiver, as there was no necessity imposed by law or practice on the officer to give the information.

Cur. adv. vult.

Taunton, J.—I have enquired as to the practice of the office; and I find, that though it is not a matter of right to see the declaration, if the defendant asks the nature of the action the information is never refused. The party might, therefore, have had the information on taking the declaration out of the office. As he might have had the information, the taking it out was a waiver of the irregularity.

Rule discharged.—*Hyde* v. *Gardner*, May 5th, 1832. K. B. P. C.

[a] 1 Dowl. Prac. Rep. 153.

ERROR.—VARIANCE.

A notice of the allowance of a writ of error is no stay of the plaintiff's proceedings, if it misdescribe the form of action.

Busby shewed cause against a rule for setting aside an execution, on the ground that it had issued after a writ of error allowed. The action was *trespass*; and the note of allowance described it as *case*. That was such a variance as left the plaintiff at liberty to sue out execution.

Hutchinson supported the rule.

Taunton, J.—It strikes me, that the cause of action must be correctly described in the notice of allowance, or the plaintiff will not be bound to take notice of the writ of error. An action of trespass is mis-described as an action on the case; though I don't know that the converse would be so; for case is a species of trespass.

Rule discharged with costs.—*Green* v. *O'Kill*, 12th May, 1832. K. B. P. C.

PROCESS.—OMISSION.

The omission of a month, in the English notice at the foot of a pluries bill of Middlesex, is now no ground of objection to the writ.

Carrington moved to set aside the service of a *pluries* bill of Middlesex, on the ground, that the name of the month in which the writ was returnable, was omitted in the English notice at the bottom of the writ. The writ was in the usual terms, and the English notice required the defendant to appear "on the 16th day of , 1832."

Patteson, J.—I think that is sufficient, as nobody could be deceived by the omission. A party knows, that writs are now returnable on days certain in term, and not according to *Feast* days.

Rule refused.—*Curson* v. *Forbes*, May 26th, 1832. K. B. P. C.

NOTES OF THE WEEK.

PROROGATION OF PARLIAMENT.

Parliament has been prorogued from Thursday the 16th of August till Tuesday the 16th October next.

The speech from the Throne contained no

other reference to the changes in the Law effected during the late Session, than that of the Reform Act and the Irish Tithes Law. It is intimated that all irregular and illegal proceedings will be discountenanced and resisted; and an exhortation is given, that relief from any real causes of complaint be sought only through legitimate channels.

STATE OF BUSINESS IN THE SEVERAL COURTS.

It has been supposed that the quantity of business in the Courts has been considerably diminished. We question whether the change is not rather from one practitioner to another, by the large increase of both branches of the profession, than a falling off in the aggregate amount. We shall probably be able to lay before our readers a statement of the writs issued and bills filed during the last term, compared with the number in previous years. When "the world has grown honest" and wise, and skill and knowledge are equally distributed amongst all mankind, lawyers will be unnecessary—not before.

PROFESSOR PARK.

We shall have the pleasure to continue, in the Monthly Record, the important Lectures of Professor Park.

As a testimony of merit to his juridical writings, we understand that the Faculty of Jurisprudence of the University of Göttingen have voted to the Professor the diploma of Doctor of Laws.

TRIAL OF COLLINS, FOR HIGH TREASON.

This case has at length been brought to a conclusion. We stated at the time of the atrocious attack, the law by which it would be decided (p. 129). The culprit has had the benefit of all the means by which state criminals are protected from any undue exercise of the power of the Crown. He has had the indictment, the list of witnesses, the right of challenging the Jury. He has had able counsel to defend him—more indeed than, it seems, he could claim. He has been found guilty, and doomed to die the death of a traitor, with all its additionally ignominious punishment. The Jury did not at first find the verdict in the terms of the indictment, but "guilty of throwing a stone, with an intent to do his Majesty some bodily harm"—omitting the words "tending to maim and wound." These were supplied, and consequently sustained the fifth count. The first count charged the intent of compassing the King's *death*. The next, as designing bodily harm, *tending* to his death. The other counts stated the offence in various ways.

Some intimation of the probability that the life of the prisoner will be spared was given by the Attorney-General, and Mr. Justice Bosanquet did not preclude the hope. The offence undoubtedly deserves a very high degree of punishment; but we think that justice may be satisfied by the infliction of one less severe than death,—of the fear of which, indeed, the miserable man appears to entertain no apprehension.

ANSWERS TO QUERIES.

COMMON LAW.

BANKRUPTCY.—PURCHASE. P 233.

In answer to the question of your correspondent E. S. (p. 233), I should say, there can be no doubt that a conveyance made by a bankrupt before his act of bankruptcy, is valid against his assignees in all cases in which it would be valid against himself, had he not become bankrupt; and the 81st sect. further renders valid all such conveyances even after an act of bankruptcy, provided they were made two months before the commission issued.

W. T.

WITNESS.—BILL OF EXCHANGE. P. 240.

1. I beg to refer your correspondent J. S. to the case of *Dickinson* v. *Prentice*, 4 Esp. N. P. C. 32, in which he will find it decided, that in an action against the acceptor of a bill, the drawer may be called as a witness to prove the defendant's hand-writing. He will also find this point fully discussed in Bayley on Bills, p. 419, 4th ed. F. A.

2. The only tenable objection against the admission of the drawer's testimony will be, that he has a direct interest in the event of the suit. In general, however, this does not affect the plaintiff's right to make use of his evidence in actions of this nature; for if he recover against the acceptor, the drawer pays the bill by the hands of the acceptor; if he fail against the acceptor, the drawer is liable to pay the bill himself; and on this ground it has been decided, that in an action against the acceptor, the drawer is a competent witness on behalf of the plaintiff, and has accordingly been admitted to prove the defendant's hand-writing. See *Dickinson* v. *Prentice*, 4 Esp. N. P. C. 32; also *Barber* v. *Gingell*, 3 Esp. N. P. C. 62. Relying therefore on these decisions, I should not hesitate to answer your correspondent's query in the affirmative. M.

APPRENTICE'S INDENTURES, P. 239.

I think the duty of 6*d.* (and not 6*s.*, as stated by your querist G. G.), and 1*s.*, imposed on

apprentice's indentures by 8 Anne, c. 9, is still legally payable, though in practice never paid. There is nothing to repeal it in the last general stamp act, nor its predecessor of 48 G. 3; nor, I believe, in those of the 44th, 45th, and 46th of the same reign, each of which was repealed to make room for its successor. All these acts commence with a preamble, declaring the necessity of imposing *additional* duties to those then in force affecting the instruments mentioned in the schedule to them. T. P.

TENANTS IN COMMON.—ELECTIVE FRANCHISE. P. 224.

Before the passing of the Reform Act, if an estate of freehold became vested, by operation of law, in any number of females, the husband of each would have been entitled to a vote, in case his interest in his wife's estate amounted to forty shillings a year; and I am not aware that the Reform Act has altered this in any one respect; indeed it contains an exception, as to all rights of voting in existence at the time the act was passed. As to the tenants of the tenants in common, in case they possess the necessary qualifications mentioned in the act, there remains, I think, not the least doubt but they are also entitled to votes. I.

LAW OF LANDLORD AND TENANT.

BANKRUPT LESSEE. P. 239.

1. If the bankrupt, the original lessee, *assigned* the premises, his whole interest therein passed to the assignee, which would create a *privity of estate* between him and the original lessor, who could enforce his rights by any of the various remedies given to lessors. But if, on the other hand, the original lessee *underlet* the same, no such *privity* would exist, and the original lessor must seek for redress against the original lessee; and the fact of the original lessee having given up his lease to the lessor, cannot operate as a *merger* of his interest, for an *outstanding estate* was then vested in a *sub-lessee*. T. T. P.

2. In answer to X. D., I beg to say, that the bankruptcy of a lessee, who had before his bankruptcy assigned the lease, could not affect the assignee: the assignees of the lessee would have nothing to do with the lease. A case of election therefore could not arise. If the bankrupt had underlet the premises, and the assignees declined accepting the lease, in consequence of which it has been delivered up, the lessor has exactly the same rights against the under-tenant as the bankrupt or his assignee would have. T. P.

LAW OF PROPERTY AND CONVEYANCING.

BANKRUPTCY.—CONVEYANCE. P. 240.

1. The assignees of *A.* can clearly set aside the conveyance to *B.* *Vide* 6 G. 4. c. 16. § 73. But the circumstances of the transaction must guide them, whether they should reject or confirm such conveyance. T. T. P.

2. I think E. S.'s construction of the Bankrupt Act, 6 G. 4. c. 16, is undoubtedly correct. *Ante*, p. 233. Any *bonâ fide* sale and disposition by a trader of his property before an act of bankruptcy committed, cannot be impeached by his assignees under a commission issuing upon an act of bankruptcy subsequently committed. There is a case in one of the reports, deciding that an execution levied by a sheriff before, but on the very day, an act of bankruptcy is committed, is unimpeachable by the assignees. The quære of W. S. is therefore answered by the above. There is no doubt that under the circumstances stated by him, the assignees could have no title to the property. The knowledge of insolvency would not, I conceive, if the transaction was *bonâ fide*, affect the purchaser's title. T. P.

PRACTICE.

PROCESS ACT.—NOTICE TO WRITS. P. 240.

In answer to T. T., I think he is not right in supposing the English notice must be subjoined to the process to be issued under the Uniformity of Process Act. The contents of the summons will point out more precisely what the defendant has to do than that notice does, and therefore the enactments of 12 G. 1. c. 29, and 5 G. 2. c. 27, made perpetual by 21 G. 2. c. 3, requiring the notice, must be taken to be necessarily repealed; besides, the Uniformity of Process Act says, that from and after, &c. the writs thereinbefore authorized shall be the only writs for the commencement of, &c., which must be read as meaning to say, that the writs authorized by that act must, after it comes into operation, be used instead of the writ and its additions which would have been necessary but for that act. T. P.

NEW RULES.—LIBEL. P. 240.

The rules of court respecting the amount of the debt and costs to be indorsed on the writ, are not applicable in an action for *libel*.

T. T. P.

FEES AT THE ACCOUNTANT GENERAL'S OFFICE. P. 240.

In answer to your correspondent J., I beg to inform him, that in the course of many years experience in an extensive Chancery office, I have never known a gratuity given to the accountant general's clerks, except where the fund has been very large, and they have had extra trouble in settling the order or otherwise; and I think your correspondent, and the profession generally, should resist any attempt to convert what has hitherto been given as a remuneration for extra official attention, into a regular fee, like the gratuities to the master's clerk. A. C.

QUERIES.

LAW OF PROPERTY AND CONVEYANCING.

LEGACY.

A. by will gives to his wife certain legacies and annuities, and also by the same will bequeaths to each of the guardians of his children, a certain sum by way of acknowledgment, not remuneration, for their trouble. He appoints his wife and several other persons guardians of his children. Perhaps some of your numerous correspondents can inform me, whether there can be any objection to the wife's taking her legacy as one of the guardians of the testator's children. I.

TRUSTEES.—LEASE.—ASSIGNMENT.

A., *B.*, and *C.*, trustees and joint tenants of the fee simple of certain hereditaments, demise the same for a term of years, under a power enabling them so to do, to *D.*, who afterwards assigns over the whole of his interest to *C.*, one of the trustees. Does the term merge? and, if so, can the trustees maintain an action against *D.* on the covenants contained in the lease? C. M. W.

COMMON LAW.

BANKRUPTCY.—ACTION.

Under a fiat in bankruptcy, the assignees chosen by the creditors have commenced several actions against the debtors to the estate. Should the official assignee have been made a party? S.

USURY.

B. discounts a bill for 500*l.*, drawn by *A.* upon *C.*, paying *A.* 200*l.* in notes, and an order on a London agent for 250*l.*, thereby receiving 50*l.* interest. *A.* obtains cash for the order on London at a country banker's, the banker first deducting 1*s.* 4*d.* postage to London. An action for penalties is afterwards brought against *B.*, and the declaration states that *A.* received 450*l.* for the bill of 500*l.* Can the action be maintained? *A.* never did receive 450*l.*, but 200*l.* in cash, and an order for 250*l.* And would the objection, that he had only received 449*l.* 18*s.* 8*d.* be fatal? Or is the transaction with the banker *A.*'s individual act, unconnected with *B.*? J.

REFORM ACT.—JOINT OCCUPIER.

A. rents a house in the new borough of Marylebone rated at 25*l.* per annum. For the last five years *B* has occupied, and still does occupy the first floor, for which he pays 26*l.* per annum. All the rates and taxes for the house are paid to the 20th July last. Is *B.* entitled to vote under the 27th clause of the Reform Act? If he is not, what is meant by the term joint occupier? M. P.

MISCELLANEA.

NEWGATE CHAPEL. — THE CONDEMNED SERMON.

Let us return to the condemned pew, supposing it to contain four persons ordered for execution. On the Sunday preceding, there is a grand ceremony, usually called "the condemned sermon," when, besides the sermon, which is of course made for the occasion, appropriate hymns are sung—such as "the Lamentation of a Sinner;" and if the execution be to take place next day, part of the burial service is performed. The condemned service is conducted with peculiar solemnity, being attended by the sheriffs in their gold chains; and is in other ways calculated to make a strong impression on the minds of the congregation, who may be considered as representing the criminals of the metropolis. Whether the impression be a good or a bad one, the reader will decide; but, in order that he may have the necessary materials for judging justly, I lay before him the following description of a condemned service, premising only this—that not a circumstance is stated which I have not witnessed. The sheriffs are already seated in their own pew, accompanied by their undersheriffs, and two friends, drawn thither by curiosity. Not far from them appear two tall footmen, swelling with pride at their state liveries. The ordinary is in his desk: his surplice is evidently fresh from the mangle: and those who see him every day observe an air of peculiar solemnity, and perhaps of importance, in his face and manner. The clerk is busied in searching out the psalms proper for the occasion. The tragedy begins. Enter first the schoolmaster and his pupils; then the prisoners for trial; next the transports, amongst whom are the late companions of the condemned men; and then the women. Lastly come the condemned. They are four in number. The first is a youth, about 18 apparently. He is to die for stealing in a dwelling house goods valued at more than 5*l.* His features have no felonious cast; on the contrary, they are handsome, intelligent, and pleasing. Craft and fear, and debauchery, have not yet had time to put decided marks on him. He steps boldly, with his head upright, looks to the women's gallery, and smiles. His intention is to pass for a brave fellow with those who have brought him to this untimely end; but the attempt fails; fear is stronger in him than vanity. Suddenly his head droops; and as he sits his bent knees tremble and knock together. The second is an older criminal, on whose countenance "villain" is distinctly written. He has been sentenced to death before; but reprieved and transported; having incurred the penalty of death by the act, in itself innocent, of returning to England. He is now about to die for a burglary committed since his return. His glance at the sheriffs and the ordinary tells of scorn and defiance. But even this hardened ruffian will wince at the most trying moment, as we shall see presently. The third is a sheep-stealer, a poor, ignorant creature, in whose

case there are mitigating points; but who is to be hanged, in consequence of some report having reached the ears of the Secretary of State that this is not his first offence; and secondly, because of late a good many sheep have been stolen by other people. He is quite content to die: indeed the exertions of the chaplain and others have brought him firmly to believe, that his situation is enviable, and that the Gates of Heaven are open to receive him. Now observe the fourth—that miserable old man, in a tattered suit of black. He is already half dead. He is said to be a clergyman of the church of England, and has been convicted of forgery. The great efforts made to save his life, not only by his friends, but by many utter strangers, fed him with hope until his doom was sealed. He is now under the influence of despair. He staggers towards the pew; reels into it; stumbles forward; flings himself on the ground; and, by a curious twist of the spine, buries his head under his body. The sheriffs shudder; their inquisitive friends come forward; the keeper frowns on the excited congregation; the lately smirking footmen close their eyes and forget their liveries; the ordinary clasps his hands; the turnkeys cry "hush;" and the old clerk lifts up his cracked voice, saying, "Let us sing to the praise and glory of God." People of London! is there any scene in any play so striking as this tragedy of real life, which is acted eight times a year, in the midst of your serene homes? They sing the Morning Hymn, which of course reminds the condemned of their prospect for to-morrow morning. Eight o'clock to-morrow morning is to be their last moment. They come to the burial service. The youth, who alone of those for whom it is intended, is both able and willing to read, is, from want of practice, at a loss to find the place in his prayer book. The ordinary observes him; looks to the sheriffs, and says aloud, "the service for the dead!" The youth's hands tremble as they hold the book upside down. The burglar is heard to mutter an angry oath. The sheep-stealer smiles, and, extending his arms upwards, looks with a glad expression to the roof of the chapel. The forger has never moved.—Let us pass on. All have sung "The Lamentation of a Sinner," and have seemed to pray, "especially for those now awaiting the awful execution of the law." We come to the sermon.

The ordinary of Newgate is an orthodox unaffected Church of England divine, who preaches plain homely discourses, as fit as any religious discourse can be fit, for the vitiated audience. The sermon of this day, whether eloquent or plain, useful or useless, must produce a striking effect at the moment of its delivery. The text, without another word, is enough to raise the wildest passions of the audience, already fretted by an exhibition of gross injustice, and by the contradiction involved in the conjunction of religion with the taking away of lives. "The sacrifices of God are a broken heart: a broken and contrite heart, O God! thou wilt not despise." For awhile the preacher addresses himself to the congregation at large, who listen attentively, excepting the clergyman and the burglar, of whom the former is still rolled up at the bottom of the condemned pew, whilst the eyes of the latter are wandering round the chapel, and one of them is occasionally winked, impudently, at some acquaintance amongst the prisoners for trial. At length the ordinary pauses: and then, in a deep tone, which, though hardly above a whisper, is audible to all, says, "Now to you, my poor fellow mortals, who are about to suffer the last penalty of the law." But why should I repeat the whole? It is enough to say, that in the same solemn tone he talks for about ten minutes of crimes, punishment, bonds, shame, ignominy, sorrow, suffering, wretchedness, pangs, childless parents, widows and helpless orphans, broken and contrite hearts, and death to-morrow morning for the benefit of society. What happens? The dying men are dreadfully agitated. The young stealer in a dwelling-house no longer has the least pretence to bravery; he grasps the back of the pew; his legs give way; he utters a faint groan, and sinks on the floor. Why does no one stir to help him? Where would be the use. The hardened burglar moves not, nor does he speak; but his face is of an ashy paleness; and if you look carefully, you may see blood trickling from his lip, which he has bitten unconsciously, or from rage, or to rouse his fainting courage. The poor sheep-stealer is in a phrenzy. He throws his hands far from him, and shouts aloud, "Mercy good Lord! mercy is all I ask. The Lord in his mercy come! There! there! I see the Lamb of God! Oh! how happy! Oh! this is happy!" Meanwhile the clergyman, still bent into the form of a sleeping dog, struggles violently; his feet, legs, hands, and arms, even the muscles of his back, move with a quick jerking motion, not naturally, but, as it were, like the affected part of a galvanized corpse. Suddenly he utters a short sharp scream, and all is still. The silence is short. As the ordinary proceeds "to conclude," the women set up a yell, which is mixed with a rustling noise, occasioned by the removal of those whose hysterics have ended in fainting. The sheriffs cover their faces; and one of their inquisitive friends blows his nose with his glove. The keeper tries to appear unmoved; but his eye wanders anxiously over the combustible assembly. The children round the Communion Chapel stare and gape with childish wonder. The two masses of prisoners for trial undulate and slightly murmur; while the capital convicts, who were lately in that black pew, appear faint with emotion.

This exhibition lasts for some minutes, and then the congregation disperses; the condemned returning to the cells; the forger carried by turnkeys; the youth sobbing aloud convulsively, as a passionate child; the burglar muttering curses and savage expressions of defiance; whilst the poor sheep-stealer shakes hands with the turnkeys, whistles merrily, and points upwards with madness in his look.—*Wakefield's Facts relating to the Punishment of Death.*

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> ——— "Quod magis ad nos
> Pertinet, et nescire malum est, agitamus."
> HORAT.

THE THIRD REPORT OF THE REAL PROPERTY COMMISSIONERS.[a]

WE shall now give some account of the Third Report of the Real Property Commissioners. As we have before stated, it treats of the following subjects:—1. Tenures; 2. Contingent Remainders, Future Estate, and Perpetuities; 3. Covenants; and 4. A period of Limitation for the Rights of the Church. We shall devote an article to each of these;—and first as to Tenures.

The Commissioners commence by considering whether it is advisable to retain the principle of law upon which the absolute property of all lands is vested in the Crown, or whether they should be allodial; and they have no hesitation in recommending that the principle should be retained. They mention the inconvenient and oppressive incidents which formerly attended Tenure, but that they have been taken away by the stat. 12 Car. 2. c. 24, "which introduced a much greater change in the law of England than any they have ventured to propose." They propose, therefore, to retain this doctrine, but to provide remedies for its inconveniencies. One of these they consider to be the escheat of lands upon the failure of the heirs of a person dying seised in fee and intestate, to the superior lord. They mention that it is difficult in some cases to ascertain who is the superior lord, and that litigation ensues, and "titles by escheat are hardly ever reckoned secure." They therefore propose that in all cases, on failure of heirs and devisees, land of freehold tenure, unless when there is a quit rent actually payable to some person as immediate lord, shall escheat to the Crown. They also propose that equitable estate shall escheat, "*instead* of the trustee becoming entitled to the beneficial interest," (which is perhaps stating the assumed existing law too broadly); that the escheated fee of a trustee or mortgagee shall be subject to equities, and that the lord shall have the benefit of attendant terms.

They then point out another great inconvenience of the doctrine of tenure-warranty, which we are happy to see they propose to abolish altogether. This will be a great relief (amongst other benefits) to the future students of property law, who, whilst this part of it still remains in force, however it may have fallen into disuse, are compelled to wade through the portion of Lord Coke and other writers relating to it, without even deriving any benefit from this most repulsive part of their studies.

The Commissioners then point out some other inconveniences arising from another feudal maxim:—

> To the feudal maxim, that the tenancy of the freehold must always be full, in order that there may be a person seised of the freehold to perform services to the lord, and to be answerable to actions of persons having claims to the land, have been attributed several very inconvenient rules of the common law, respecting the creation of freeholds *in futuro*, the destruction of contingent remainders, the effect of wrongful conveyances, and the modes of transferring estates and interests in real property. Although some of these rules have been evaded by various expedients, and particularly by a subtle application of the statute of uses, by means of trusts, and by courts of

[a] This Report, with the Propositions of the Commissioners, will be printed *verbatim* in the Monthly Record for August.

justice having taken upon themselves to permit that to be done by will, under the name of executory devise, which cannot be done by deed, they still continue to occasion serious embarrassment. We propose to consider them fully in this and a subsequent Report, when we hope to suggest effectual remedies, by giving a simple and direct power to dispose of real property, commensurate with the purposes which it is thought desirable to effect. If we succeed in obtaining these objects, every advantage will be gained to the Law of Real Property which could be expected, from declaring all freehold land in England to be allodial. Indeed, there is no difference, in the practical result, between lands being supposed to be allodial to vest for want of heirs in the State, as *ultimus hæres*, and to be forfeited to the State for the crimes of the owner, and lands being supposed to have been granted by the State, to be enjoyed while heirs continue, and to revert to the State for want of heirs, or on breach of the condition of the good conduct of the tenant.

They proceed to observe, that the variety of tenures now existing is a considerable evil. They thus enumerate them:—1. Frankalmoign. 2. Grand Sergeanty. 3. Free and Common Socage. 4. Socage, subject to the custom of Borough English. 5. Socage, subject to the custom of Gavelkind. 6. Ancient Demesne. 7. Copyhold. 8. Customary Freehold.

1. Frankalmoign is the tenure by which land is usually held by the church. It is merely nominal, and as it seems not to have given rise to any question, they propose to continue it. 2. Grand Sergeanty they consider pretty much in the same light; it "gives rise to no litigation, and it is rather desirable that it should be preserved, as illustrating the antiquities and history of the country." 3. Free and Common Socage is the tenure by which the great bulk of real property in England is now held. The Commissioners point out its advantages, which are sufficiently well known, and propose no alteration in it.

So far the existing tenures meet the approval of the learned Commissioners. They propose, however, to modify all the others. Thus, 4. Borough English, under which lands descend to the youngest son, they consider indefensible in argument and inexpedient in practice, and therefore propose its abolition. 5. Gavelkind they also consider to be attended with inconvenience politically, and as far as titles are concerned; which last we consider the best objection to it.

One case was stated to us, "in which, in order to clear an estate of all doubts about the title, it was necessary to have about forty persons vouched in a recovery, the estate being split among forty heirs." A conveyancer of the first eminence, to a question respecting the operation of the custom of Gavelkind, answered, "I have more than once had titles before me, in which it was almost impossible to ascertain with accuracy how far the estate was divided. I know it did come to half a seventy-second in one instance, and it was amazingly complicated. I have had several times great difficulty in deducing the title, on account of the subdivisions of the estate. I had one instance, in which there were twenty-nine parties interested in property that was not worth above 300*l*."

They therefore recommend a total abolition of this customary tenure. 6. Ancient Demesne they also propose to abolish, and observe that this title, "under which there at present is so much perplexed learning, will then be struck out of the law."

They next proceed to the important enquiry, whether it is expedient to abolish all or any part of the tenure by Copyhold. They point out at length, and with great correctness, the disadvantages and advantages of this tenure (for which we must refer the reader to the Report itself); they mention the difficulties in the way of a general enfranchisement, and end by making the following propositions, which are so important, that we give them fully:—

All that we deem practicable, and can recommend, is to give facilities to voluntary enfranchisement where there are particular estates in the manor or in the copyhold tenement, and to introduce certain improvements in the law relating to copyholds while they continue to exist.

Enfranchisement, we think, must in all cases remain a voluntary proceeding, to be accomplished by a contract of the lord and the tenant. But at present no enfranchisement can be effected, unless both parties are entitled to the fee simple; and enfranchisement has no doubt been much impeded by this difficulty.

We see no objection to enacting, that any lord of a manor seised of an estate not less than for life, shall be empowered to enfranchise any copyhold within the manor, in consideration of a competent part of the copyhold land to be surrendered, and to form part of the manor, or of a competent annual sum, payable by way of rent-charge, out of the tenement, to the lord of the manor for the time being; and that the tenant seised of a like estate in the copyhold, shall be empowered to obtain enfranchisement, by giving up part of the copyhold tenement, or charging it with the annual payment.

Some regulations will be necessary to guard against fraud, but whenever fraud can be proved, it will render the transaction invalid; and there seems no greater reason to apprehend fraud in this transaction, than in the execution

of powers to lease which are vested in tenants for life, by almost every settlement.

Perhaps it may be permitted, that where the value of the enfranchisement exceeds a certain sum, the consideration, instead of a rent, may be a sum of money, to be paid to trustees nominated by each of the parties, or to the Accountant General of the Court of Chancery or Exchequer, upon trust, to be applied in redemption of the land-tax, or the discharge of incumbrances, or to be laid out in land, to be settled to the uses to which the manor stands limited, and invested, in the mean time, in the public funds.

We think that it should be provided, that an enfranchisement, in consideration of part of the land, or of a rent, whether between persons supposed to be seised in fee, or such as appear to have only partial estates, shall not be avoided by reason of any defect in the title, either of lord or tenant. Great inconvenience is now felt from the necessity of investigating the title of the lord, when an enfranchisement is to take place; and during a long course of years, upon every alienation of the enfranchised land, an investigation is necessary of the double title, *i. e.* the title to the manor and the title to the copyhold tenement. In case of eviction, little injury can be sustained on either hand; for the lord will have in the land or rent an equivalent for what is lost by the enfranchisement; and the tenant will have an equivalent in the enfranchisement for what is given to the lord. Such instances of eviction will be exceedingly rare, and the aggregate of inconvenience arising from them must be infinitely small, when compared with what would arise from the continual double investigation of title, which must otherwise take place on every dealing with an enfranchised copyhold. These propositions, however, will require modification with respect to manors held by the church.

It may encourage enfranchisements, and prevent disputes respecting the extent of manors, to provide that the tenement, when enfranchised, shall be held of the manor. At present, a copyhold tenement being part of the lord's demesne, is, when enfranchised, held of the superior lord of the fee; that is, of the same lord of whom the manor is held; and it ceases to be parcel of the manor, whereby the lord loses his manorial privileges.

We would further propose, that when by purchase, or any other means, a copyhold tenement of inheritance unites with the manor, the lord shall be forbidden to regrant it as a copyhold; and that there shall be no further grants of parcels of the waste to be held by copy of court-roll, in manors where the waste is supposed to have had a quality admitting of such grants, with the assent of the homage.

We are not aware of any other measures which can be safely adopted for the extinction of copyhold tenure; but while it continues, there are various measures which we have to propose, with some confidence, for mitigating its inconveniences.

In the first place, we think that all peculiar customs respecting descent, curtesy and dower, should at once be abolished, and that the common law rules upon these subjects for freehold lands, as modified by statutes, should universally prevail. A great source of difficulty, delay and expense, in the alienation of copyhold lands, and of litigation respecting them, would thus be removed.

We think that a will of copyhold land should be made with the same formalities as a will of freehold land.

This subject will be more fully discussed in a subsequent part of our Report.

We think that a power should be given to the copyhold tenant to grant a lease at rack-rent for twenty-one years, out of his own interest, without the license of the lord. Where the fine is certain, this cannot prejudice the lord; and where the fine is arbitrary, it must be for his advantage.

We think that copyhold land should be subject to debt, in the same manner as freehold land, and that whatever remedy is given to creditors over the one, should extend over both. The notion that the lord was not to have a tenant forced upon him by means of an execution, is an obsolete subtilty, unconnected with existing rights of property.

The risk which might be introduced into the title to copyhold lands, by making them liable to the execution of the Crown, may be obviated by confining the remedy to debts due to the subject; but we hope to see the foundation of the objection entirely removed, by an accessible register of all Crown debts and obligations intended to be binding on the land.

It seems impossible to interfere with the rights of the lord and the tenant, as to timber and minerals; and it can only be hoped, that such an irremediable evil of the tenure, will induce parties to avail themselves of the new means furnished to them of putting an end to it.

But heriots due to the lords of manors, whether from copyhold or freehold tenants, we think should be abolished, upon a pecuniary commutation.

Heriots are a reproach to the law of England, and must be considered as a remnant of that barbarous state of society, which existed at their introduction by the Danes. When the tenant dies, his best beast, or best chattel, is to be seized by the lord, the lord being entitled to enter the house or land, and appropriate to himself the object of his choice. In this case the benefit conferred by the right, is not nearly equivalent to the prejudice done to those against whom it is exercised. It leads, not only to ill-will and strife between neighbours, but to constant fraud and evasion. To defeat the claim of the lord, the legal estate is placed in the name of a person whose residence will prevent the lord from exercising his right. When a yeoman is supposed to be *in extremis*, his family sell his cattle at a sacrifice, or drive them out of the manor. The steward, on the other hand, makes irregular entries on the roll, and procures irregular presentments by the homage, of heriots being due on

the death of the tenants, and of payments being excused or compromised, with a view to make evidence to extend the lord's claim on some future occasion.

Most vexatious, odious and expensive law suits, frequently arise from the claim to heriots.

But still they are property, and cannot be justly abolished without some compensation.

It would be impracticable for commissioners, or for a jury, to put a pecuniary value upon the entire interest in the right, according to the circumstances of each case.

We propose that the claim to the heriot, in specie, shall be commuted into a right to a sum of money, for which the lord shall be allowed to distrain on the tenement, or to maintain an action against the person succeeding to the tenancy: even if a sum so low as five pounds were paid for each heriot, not only would the tenant be greatly relieved, but the change would probably be found for the advantage of the lord, as he would not then scruple to enforce his right, and no attempt would be made to evade it. If it had been found impossible to indemnify the lord, perhaps this might have been thought a case in which the supposed interest of the individual must give way to the public good.

At present the lord's alienation of the freehold of any of his copyholds, separates them from the manor, and the copyholders are deprived of the power of conveying their estates at law. To remedy this inconvenience, we propose that copyholds may always be conveyed in the Manor Court, as if the freehold of them remained part of the manor.

In order to remove the difficulty of distinguishing copyhold from freehold land, we propose, that where both the freehold and copyhold are held in fee-simple, the owner or owners of the land, with the lord for the time being, by the consent of the homage to be given after a survey, may agree and determine upon the lands, or any of the lands which shall be copyhold.

We have been desirous of extending this provision to the case of persons having limited interests; but, upon full consideration, we have found insurmountable difficulties in the way of doing so.

A Customary Court cannot be held, unless two copyholders be present; and where there are but few copyholders, the lords of manors are unwilling to grant any enfranchisement, from an apprehension that they may be unable to procure the attendance of a sufficient number of tenants for holding a court. We propose that a court for surrenders and admissions may be held, although no copyholder be present. Several improvements, which we shall specify in the subjoined propositions, we think may be introduced, with respect to the taking and presentment of surrenders, and the power of the steward, as well as the lord, to admit in a court held out of the limits of the manor.

The Commissioners close this part of their Report with a notice of—8. Customary Freehold; and state that the propositions before stated with respect to copyholds, will extend generally to customary freeholds, except that a specific enactment with respect to devises is necessary, as to which, however, the Commissioners do not propose any partial change of the law applicable to customary freeholds, but refer to a general measure which they are to bring forward hereafter.

We cannot close this our first notice without giving our ready opinion, that this Report shews evident signs of great care and judgment, and must be perused with attention by the Profession. We shall shortly return to the other parts.

PRACTICAL POINTS OF GENERAL INTEREST.

No. XXIX.

STATUTE OF LIMITATIONS.

The case of *Burleigh* v. *Stott*, 8 B. & C. 36, decided that the payment on account by one of many joint contractors, had the effect of fixing them all. By the following case it has been decided, under the 9 G. 4. c. 14, that the payment of interest within six years, by one of several joint contractors, takes a debt out of that statute and the other statutes of limitations.

This was an action on a promissory note for 1000*l*., which the defendant, as surety, had made jointly and severally with his brother, in November 1824. The Statute of Limitations having been pleaded, the plaintiff proved payment of interest, by the defendant's brother, up to 1828; whereupon a verdict was found for the plaintiff, with leave for the defendant to move to set it aside and enter a nonsuit, on the ground that payment of interest by a joint contractor would not, as against the co-contractor, revive a debt barred by the statute.

The judgment of *Tindal*, C. J., was as follows:—

Tindal, C. J.—It seems clear to us, that the defendant is not protected by the statute. The question turns on the construction of 9 G. 4. c. 14; and in order to consider that rightly, we should see what the law was before that statute passed. Now, in *Burleigh* v. *Stott*, which was like this, an action against the administrator of a surety on a joint and several promissory note, it was held, that a payment on account of the note within six years, by the other joint contractor, operated as a promise to pay the residue by all who were jointly liable. The

statute then provided for the case of promises by one of many joint contractors. After enacting that an oral promise shall not suffice to revive a demand barred by the Statute of Limitations, it proceeds: "And where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them." That is a provision in favour of such as are not parties to the written promise. Then, with respect to payment of principal or interest, it provides, "That nothing herein contained shall alter or lessen the effect of any payment of any principal or interest made by any person whatsoever." Not confining the effect of payment to the individual paying. Why? Because the payment of principal or interest stands on a different footing from the making of promises, which are often rash, or misinterpreted, while money is not usually paid without deliberation; and payment is an unequivocal act so little liable to misconstruction, as not to be open to the objection of an ordinary acknowledgment. The statute then proceeds to enact, "That in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise, that the plaintiff, though barred by either of the said recited acts or this act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgement, or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant, or defendants against the plaintiff." It has been urged, that from the word "otherwise," we must imply "by payment of interest;" and thence infer, that payment of interest, like the written acknowledgment or promise with which it is coupled, is to operate only against the party paying. But there are various acts to which the word "otherwise" might apply, as payment into Court, or indorsement by a party who had received interest. However, on the broad construction of the act, we think payment of money by one of several joint contractors, an acknowledgment not within the mischief or the remedy provided by the legislature against the effect of an oral promise. *Wyatt* v. *Hodson*, 8 Bing. 309.

ON THE REFORM OF THE INNS OF COURT.

To the Commissioners appointed to enquire into the State and Practice of the Common Law in England.

Gentlemen,

It was with great satisfaction I learnt that the subject of the present system of admissions to the Inns of Court, and Calls to the Bar, had been referred to your consideration, in whose hands we have a guarantee for its receiving that careful and serious attention it merits, in having already witnessed your profound and patient investigations, and the advantages resulting from your labours under the commission on which you are now engaged. It is therefore with the greatest deference, and only from an ardent desire to see the stain which the abuses in these institutions have brought on the body of which you are individually such distinguished members, as speedily as possible removed, and a wholesome and healthy system substituted in its stead, that I am induced to offer the following remarks to your notice.

It is notorious that the revenues of the Inns of Court are very considerable; and I conceive it to be equally so, that they are not at present appropriated to the purposes for which they were originally intended; and, I think I may venture to add, that it is not less obvious, that the profession of the present day lose, by this perversion, the very great benefits which their brethren, at the time of their establishment and for centuries afterwards, derived from them. Unless it can be shewn that there is not, at the present day, the same need for institutions of the nature these were of at their establishment, or that the disadvantages occasioned by the misappropriation are compensated or counterbalanced by some greater benefit to the profession, or to that particular portion of it who especially enjoy (if it may be so termed) the fruits of the misapplication, (and even if this could be proved, I am not prepared to admit that it would alter the case,) it will be readily admitted that the perversion complained of cannot be justified.

I do not expect that any person will be easily met with who will deny the very great advantage the profession would derive from an institution for the regular and systematic study and acquirement of legal knowledge, and for preserving its respectability. Nor do I expect that any one will be found to justify the present system, still less to contend that either of these *desiderata* are secured by it. The question then is, whether that system is susceptible of such a reform as will render it suitable to the wants of the present day? Whether it can be purified of its corruptions, and restored to its pristine health and vigour? That it could, there cannot be a shadow of doubt. The difficulty only arises, as to the mode in which it is to be accomplished.

Those who are members of the present institutions will, no doubt, deem it necessary, from their possessing revenues adequate almost to the support of the desired establishment, that rules of an exclusive nature with regard to the qualifications of candidates for participation in their advantages should be had recourse to, and thus shut out a vast proportion of the community, having otherwise just claims and pretensions to the honours of the profession, from any hopes of ever becoming members of it,—a disadvantage that would not, ac-

cording to my humble views, attend the establishment of any new institution. If an institution was now, for the first time, about to be founded, I take it the matter would be attended with very little or no difficulty, as in the proposed establishment the best and most approved means of promoting and facilitating the acquirement of legal proficiency, and securing respectability (the only things to be provided for,) would be adopted. The former, of course, would be secured by engaging men most competent to the task of instruction, and adequately remunerating them; and the expense of this, together with the time and labour necessary to be bestowed by the students, added to a rigid examination as to their legal qualifications, would, I conceive, secure the latter. It should never be forgotten, in considering the laws for insuring the competency and respectability of the bar, that this profession is unlike any other. The public can hardly, in any case, suffer from a want of competency or respectability in its members, as it may, from the same causes, in members of other professions. The attorney and medical adviser, for instance, are consulted by the clients and patients themselves, and frequently, particularly the latter, on the spur of the moment; under which circumstances it is obvious the want of due skill may be attended with the most serious consequences. But the client never thinks of going immediately to the barrister; the barrister is always consulted through the medium of an attorney or solicitor, who, of course, can judge of his competency; and on this account a barrister must be almost invariably both competent and respectable, or he will not be retained, and will then of course be harmless.

The expense of any new establishment, it will be obvious, would have to be borne solely by the founders and their successors. Here, then, we come to the difficulty. Shall the absence of the necessity of the members of it being at this expense, prevent the public and the profession from gaining what is confessedly so desirable,—a proper institution for the education and association of the members of the bar, with such rules for guarding against the admission of improper persons as are adapted to ensure that end, and that only? Shall that which ought to be deemed an advantage, viz. the existence of a fund to support such an establishment, and which was originally intended for that purpose, be the only impediment to its acquisition? It would be folly to expect that, whilst the present institutions remain in their unreformed state, any other suited to the necessities of the profession could be established. Is the profession then to have the mortification of knowing what is needed, without having the power to supply the defect;—and the still further one of seeing the very funds, which were designed for the support of what they so need, converted to other purposes? Or will the members of the present institutions listen to the supplications of their brethren and the public, and reform those institutions, and put them upon a proper basis? Most certainly they ought to do the latter. That they will do so, I feel most sanguine.

I am satisfied, that upon its being shewn to the members of these institutions, that the present appropriation of their revenues is not that which was originally designed, and the advantage which would be derived from their reconversion to their proper objects, they will readily relinquish the advantages derived from their present abuse, and rejoice at the performance of an act of honour and justice, by which their brethren and successors will be so great gainers. In this hope, I trust you will recommend the abolition of the present system, and the appropriation of the revenues in the best manner for securing the legal competency and respectability of the bar. The relinquishment of the irresponsible power of admission and non-admission, I take for granted, will be one of your recommendations; the loss of which, from the degree of obloquy that attaches to it, I should apprehend would very little grieve the present possessors. I have the honour to be,

With sentiments of esteem,
Your most obedient humble servant,
T. P.

REMARKABLE TRIALS.

No. XIII.

CASE OF COWPER, MARSON, STEVENS, AND ROGERS, FOR MURDER.

[*Concluded from page* 266.]

The case for the prosecution having been closed, Mr. *Cowper* proceeded to address the Court and jury as follows:—Now they have done on the part of the King, my lord, and you, gentlemen of the jury, I must beg your patience for my defence. I confess it was an unfortunate accident for me (as Mr. Jones calls it) that I happened to be the last person (for ought appears) in the company of a melancholy woman. The discourse occasioned by this accident had been a sufficient misfortune to me, without any thing else to aggravate it; but I did not in the least imagine, that so little, so trivial an evidence as here is, could possibly have affected me to so great a degree, as to bring me to this place, to answer for the worst fact that the worst of men could be guilty of.

My lord, your lordship did just now observe, that I have appeared at the bar for my clients, but I must say too, that I never appeared for myself, under this, or the like circumstances, as a criminal, for any offence whatsoever.

Mr. Jones, very well said, when he spoke on the part of the King, that if this gentlewoman was murdered, the crime was villainous, base, barbarous, and cruel; and for my part, I think so too, the crime would be so great that it could never sufficiently be condemned. But at the same time, I may aver, that to suppose a murder, without good grounds for it, and afterwards to charge innocent men with it, knowingly and maliciously, is, to a trifle, as

base and barbarous as the murder itself could be. My lord, I speak for my own part, I know not at what place other men may value their lives, but I had much rather myself was murdered than my reputation; which yet, I am sensible, hath suffered greatly hitherto by the malice and artifice of some men, who have gone pretty far in making this fact, as barbarous as it is, to be credited of me. And, therefore, I must beg your lordship's, and the jury's patience, while I not only defend my life, but justify myself also, from these things that have unjustly aspersed me, by the conspiracy and artifice of my accusers.

My lord, in all the evidence that hath been given, I must observe, there is no positive evidence, with submission, to induce the jury, or any one to believe, that this gentlewoman was murdered; but they go upon suppositions and inferences, which are contradicted by other circumstances, in the very evidence of the prosecutor, that make full as strong to prove she was not murdered as that she was; so that as it stands, it can amount only to a bare supposition, that she was murdered by any body.

Then, as to the evidence that particularly relates to myself, or the gentlemen who stand with me at the bar, that they, or I were concerned in it, (if she was murdered) there is not one syllable of proof; at most, it amounts but to make us suspect of a murder, not proved, but only suspected; this I observe upon the evidence, as it now stands without answer, as it has been given on the King's part; and how far in the case of life, men shall be affected with evidence of this nature, which neither proves the murder in general, nor that they did it in particular, though no defence was made, or any further answer given, I must submit to your lordship, and the jury.

But, my lord, I do not doubt but I shall be able to wipe away even that suspicion by my defence. I shall prove fully and clearly, in the first place, that there was no ground at all in this case to suppose she was murdered by any one but herself.

The first fact that they insisted upon to infer a murder from it was, that the body was found floating; now, my lord, that fact I am able by the evidence I have, as well as from that of the prosecutor, to deny; for the fact was directly otherwise, that is, she was not found floating.

And whereas the prosecutor's witnesses, who have been produced to this point, are obscure and poor men, and your lordship observes, have been taught to say generally that she floated, which, when they are required to explain, and describe how she lay, they contradict themselves in, by shewing she lay sideways between the stakes, and almost all under water: now I shall give your lordship and the jury a full and particular account and description, from the parish officers, men employed by the coroner to take the body out of the water, of the very manner and posture in which it was first found, which they are much better able to do than the prosecutor's witnesses, having seen her before all, or most of those people. And these officers clearly agree that her body was under water when found, except some small appearance of her petticoats, near or on the surface of the water, which may be very easily accounted for, because the stakes the witnesses mention, and which are driven to the ground cross the river to prevent weeds from running into the mill, stand, as the witnesses have already said, about a foot distance from one another, and are set with their feet from the mill, and their heads inclining towards the mill with the stream. Now, my lord, every one knows, that though a drowned body will at first sink, yet it is buoyant, and does not go down right, and rest in one place like lead; for a human body is seldom or never, in a stream, found to lie where it was drowned. Now if a body is so buoyant as that it is driven down by the impellant force of the current (though it do not float above water) it seems a consequence that when it comes to be stopped and resisted by the stakes, which lie with their heads downwards, inclining with the stream, the stream bearing the body against the stakes, must needs raise it upwards to find another passage if possible, when the ordinary and natural is obstructed. I have seen, I remember, that where weeds have been driven down a river, and have been rolled along at the bottom, when they have come down to a board or stakes of a wyer or turnpike, they have been, by the force of the water, raised up against those boards or stakes, and forced over them, though without such obstruction they had undoubtedly continued to roll along under the water. I don't know of any other symptom they pretend to, of her not being drowned, from any thing observed of her in the water, than as to the flatness of her belly when she was put into her coffin. I shall shew it as a common and natural accident, sometimes drowned bodies are swelled more, sometimes less, sometimes not at all; I think it hardly deserves a physician to prove that a body may be drowned with very little water, that a man may be drowned by strangling, or suffocation, caused by a little water in the lungs, without any quantity of water received in the body, is a certain and established truth; for I am told, that when respiration ceases, the party dies and can receive no more water after that; so that nothing is to be inferred from a body's having more or less water found in it, especially, if your lordship will give me leave to observe this distinction, where a body is voluntarily drowned, and where it is drowned by accident; for people that fall in by accident do struggle and strive as long as they can; every time they rise they drink some water in the stomach to prevent its passing into the lungs, and are drowned no sooner than needs must; but persons that voluntarily drown themselves, to be sure, desperately plunge into the water to dispatch a miserable life, as soon as they can; and so that little quantity in the lungs, which causes death, may be the sooner taken in; after which, no more is received. And I hope, by physicians, it will appear, there is good groun for this difference.

The next is the evidence that the chyrurgeons have given on the other part, relating to the taking this gentlewoman out of her grave after she had been buried six weeks: whether this ought to have been given in evidence in a criminal case, I submit to your lordship. But as it is, I have no reason to apprehend it, being able to make appear, that the gentlemen who spoke to this point, have delivered themselves in that manner, either out of extreme malice or a most profound ignorance; this will be so very plain upon my evidence, that I must take the liberty to impute one or both of those causes to the gentlemen that have argued from their observations upon that matter.

And now if your lordship will but please to consider the circumstances under which they would accuse me of this horrid action, I don't think they will pretend to say, that in the whole course of my life I have been guilty of any mean or indirect action, and I will put it upon the worst enemy I have in the world to say it. Now for a man in the condition I was in, of some fortune in possession, related to a better, in a good employment, thriving in my profession, living within my income, never in debt, (I may truly say not five pounds at any one time these eight years past) having no possibility of making any advantage by her death, void of all malice, and, as appears by her own evidence, in perfect amity and friendship with this gentlewoman, to be guilty of the murdering her, to begin at the top of all baseness and wickedness, certainly is incredible.

[The prisoner then entered upon some details tending to shew that the prosecution originated in malice, and that an imputation against the prisoner, regarding some pecuniary transaction was unfounded. He then proceeded:—]

Then, my lord, not to rest it here, but to satisfy the jury, and the world, how this gentlewoman came to destroy herself, I shall give the clearest evidence that was ever given in any court that she murdered herself; when I enter upon this proof, I must of necessity trespass upon the character of this gentlewoman that is dead. I confess this is a tender point, 'tis a thing I would willingly be excused from, and 'tis not without a great deal of reluctancy and compulsion forced from me. That she was melancholy, the prosecutors themselves have proved; but I must of necessity shew you the occasion and reasons of it, and the witnesses will tell your lordship, what desperate resolutions she had been under formerly, and that will lead me near to the time of her death. To shew why, and upon what accident she made away with herself, I will not enumerate particulars by way of opening; only I must tell your lordship, that some letters of hers must of necessity be produced, which truly, as I said, I should not meddle with, if I had not these innocent gentlemen here to defend, as well as myself; perhaps it may be said, that in honour I ought to conceal the weakness of this gentlewoman, but then in honour and justice to these gentlemen that are falsely accused with me, I cannot do it; I hope this one reason will excuse me to the world, for I have no other that could have obliged me to bring these letters upon the stage; I solemnly protest, if I stood here singly in the case of my own life, upon the evidence given against me, I take it to be so inconsiderable, I would not do it; but I must do it, to shew that these gentlemen also are innocent, and to preserve them, because I am satisfied in my own mind they are so. My lord, when I have done that, I shall shew your lordship in the next place, that it is utterly impossible I could be concerned in this fact, if I had had all the motives and provocation in the world to have done it; I shall shew your lordship, in point of time, it could not be.

The maid, Sarah Walker, who is the single witness, I take it, that says any thing in the least relating to me, said but now, the clock had struck eleven before she carried up the coals, and about a quarter of an hour after, while she was warming the bed above stairs, she heard the door clap, and some time after that she came down, and found that I and her mistress were gone. Now, in point of time, I shall prove it utterly impossible I could be guilty of the fact I am accused of, being seen to come into the Glove Inn as the town clock struck eleven, and staying there more than a quarter of an hour, was, after several things done at my lodging, in bed before twelve o'clock, and went no more out that night, as I shall prove. As for that little circumstance of sending for my horse, which they have made use of all along to back this prosecution; their very telling of that matter, shews how they are put to their shifts to justify their accusing me; I say, in prudence, I ought to have done what I did: I sent for him on the Tuesday, but as their witness saith, I told him, at the same time I bid him fetch my horse, not to use then, nor till by the course of the circuit, I was to go into Essex with the judges next morning; and till then the prosecutor's witness, who is the hostler of the Glove Inn, was ordered to set him up there, to litter him down, and to take care of him and feed him, and that he should be ready for me to go to Chelmsford on the morrow, whither I went with the other counsel the next morning, being Wednesday; and this, my lord, is the whole of that matter.

Evidence was then given by numerous witnesses on the part of the prisoners, as to the state in which the body of the deceased was found, and several physicians and surgeons were called, and gave their opinions on the inferences to be deduced from such evidence in favour of the accused. The other circumstances stated in the defence were also proved.

The summing up of Mr. Baron *Hatsell* accurately contained the substance of all the material parts of the evidence, and will be sufficient for the present purpose. It is as follows:—

Gentlemen of the Jury, you have heard a very long evidence, I am sure that you can't expect that I should sum it up fully; but I will take notice of some things to you, that I think are most material, and if I omit any thing that is material, I would desire Mr. Jones (that

is counsel for the King) and Mr. Cowper, to put me in mind of it.

The indictment against the prisoners at the bar is for a very great crime, it is for murder, which is one of the most horrid of all crimes. You are to consider, first, what evidence you have heard to prove it; and though there be no direct proof, you are to consider what is circumstantial.

They do begin with Sarah Walker, who was Mrs. Sarah Stout's maid; and she tells you, that Mr. Cowper, when he came to this town upon Monday, the 13th of March last, came to Mrs. Stout's house and dined there, and went away at four o'clock in the afternoon; but she tells you, that the Friday before, there came a letter from Mr. Cowper's wife to Mrs. Stout, to let her know that Mr. Cowper would come and lodge at their house at Hertford at the assizes, so that when he came, she thought that he had intended to have done according to that letter. She saith, that after dinner Mr. Cowper went away, and came at nine at night, and there he supped; he was desired so to do, (and indeed had been invited to dinner also that same day); and she doth say, that after supper there was a fire made in his chamber, (for this young gentlewoman, Mrs. Stout, pressed him to lye at their house,) and she ordered the maid to warm his bed, and I believe, says she, Mr. Cowper heard her say so, for he was nearer to her than I at that time, and he doth not deny but that he heard it; she says, that accordingly she went up to warm the bed, and having staid there a while, she heard the door clap, and when she came down into the parlour, where she had left them, they were both gone, and that she could not tell what the meaning of it was, and they waited for her all night, old Mrs. Stout and this maid, and she did not come in all night, nor was afterwards seen alive. But Mr. Cowper was the last person seen in her company.

The other witnesses that came afterwards, speak concerning the finding of the body in the river, and tell you in what posture it was. I shall not undertake to give you the particulars of their evidence, but they tell you she lay on her right side, the one arm up even with the surface of the water, and her body under the water; but some of her clothes were above the water, particularly, one says, the ruffles of her left arm were above the water: you have heard, also, what the doctors and chyrurgeons said on the one side, and the other, concerning the swimming and sinking of dead bodies in the water, but I can find no certainty in it, and I leave it to your consideration.

Another circumstance they build on, and which seems to be material, is of her belly being lank, and that there was no swelling; whereas, say they, when a person is drowned, there is a great deal of water goes in, and makes the belly to swell; but here was no swelling that morning she was taken out, and no water came out of her mouth and nostrils, only a little froth there was, and her belly was lank; but say they on the other side, that may very well be, for perhaps she might be choaked immediately, as soon as she was in the water, and, say they, you may not wonder at that, for if she went to drown herself, she would endeavour to be choaked as soon as she could, for those persons that are drowned against their own consent do swallow a great deal of water, but those that drown themselves don't swallow much water, for they are choaked immediately by the water going into the windpipe, that we commonly call going the wrong way. The doctors and chyrurgeons have talked a great deal to this purpose, and of the water's going into the lungs or the thorax, but unless you have more skill in anatomy than I, you won't be much edified by it. I acknowledge I never studied anatomy; but I perceive that the doctors do differ in their notions about these things; but as to matter of fact, it is agreed to by all the witnesses for the King, that her body was lank, her belly was thin, and there was no sign of any water to be in it. They on the other side tell you, that her stays were on, and she was strait-laced, and that might occasion her belly's being so small, and hinder the water from going in.

Gentlemen, I was very much puzzled in my thoughts, and was at a loss to find out what inducement there could be to draw in Mr. Cowper, or these three other gentlemen, to commit such a horrid barbarous murder. And, on the other hand, I could not imagine what there should be to induce this gentlewoman, who was a person of a plentiful fortune, and a very sober good reputation, to destroy herself.

Now, Gentlemen, I must confess, the evidence that the defendants have given by these letters, if you believe them to be this gentlewoman's hand-writing, do seem to fortify all that Mr. Cowper's witnesses have said concerning her being melancholy; it might be a love-distraction, and she might have been a virtuous woman for all that; for it might be a distemper which came upon her, and turned her brains, and discomposed her mind, and then no wonder at her writing thus, in a manner different from the rest of the actions of her life. Gentlemen, you are to consider and weigh the evidence, and I will not trouble you any more about that matter. As to these three other gentlemen, that came here to this town at the time of the last assizes, what there is against them you have heard; they talked at their lodging at a strange rate concerning this Mrs. Sarah Stout, saying, her business is done, and that there was an end of her courting days, and that a friend of theirs was even with her by this time. What you can make of it, that I must leave to you, but they were very strange expressions, and you are to judge whether they were spoken in jest, as they pretend, or in earnest. There was a cord found in the room, and a bundle seen there, but I know not what to make of it. As to Mrs. Stout, there was no sign of any circle about her neck, which, as they say, must have been, if she had been strangled. Some spots there were, but it is said, possibly those might be occasioned by rubbing against some piles or stakes in the

river. Truly, Gentlemen, these three men, by their talking, have given great cause of suspicion, but whether they or Mr. Cowper are guilty or no, that you are to determine.

The Jury, having deliberated about half an hour, acquitted all the prisoners.

SELECTIONS FROM CORRESPONDENCE.

No. XII.

AFFIDAVITS IN BANKRUPTCY.

Sir,

As none of your correspondents have set your correspondent ASPIRO right, (see his letter in the Legal Observer, 21st July last,) allow me to state for his information, as well as for the information of others, that all affidavits, for any purpose whatever, in bankruptcy, whether such affidavits are to be used under town or country fiats, may be sworn before any Commissioner in Basinghall Street, or before the Judges of the Court of Review, and that without paying anything for the oath, which amounts to a saving of 1*s.* 6*d.* upon every affidavit sworn. The only affidavit that must be sworn before a Master or Master Extraordinary in Chancery, is the affidavit of the petitioning creditor, upon which the fiat issues. Since January last, I have had numerous affidavits sworn in Basinghall Street, for which I have never paid one farthing. And it is well known, that in consequence of the loss sustained by the clerk at the Public Office in Southampton Buildings, he is applying for compensation.

AMICUS CURIÆ.

CHANCERY RECORDS IN THE TOWER.

Sir,

Through the medium of your publication, you might do much good by recommending a reduction in the charge for searching the records down to the year 1755, from the Six Clerks' Office, which are now deposited in the *Tower*. There is a list of all the causes in each term under each respective letter, therefore there cannot be much trouble in a search. All the fees payable on account of searches are accounted for *to the Treasury*, who allow to the officers of the Record Office what they think proper. Now upon a search, the fee is 16*s.* 8*d.*; and if a copy is made, either 6*d.* or 1*s.* per folio; either of which, even the first, is far too heavy, as the proceedings are mostly long: and if the fee on search was only 6*s.* 8*d.* it would be quite sufficient, and be the means of gaining information which cannot otherwise be obtained.

SCRUTATOR.

ACT FOR SETTLING THE CHANCELLOR'S SALARY.

By the 53 G. 3. c. 24, a power was given to invest 60,000*l.*, part of the dead fund, for payment of Chancery salaries (which I presume was done). Lord Brougham proposes to take 150,000*l.* more, making together 210,000*l.*; and he is to have 10,000*l.* per annum clear, besides various annuities to his sinecure officers. Notwithstanding this large sum appropriated from the dead fund, I perceive that the fees payable to his lordship are still to continue to be paid and invested. Now I wish to know in what way the public and suitors are to be benefited by his lordship's salary being fixed? As his fees continue as heretofore (although he does not receive them), I cannot see how the suitors will be benefited. Perhaps you can also explain how the dead fund is *now* appropriated, and the amount of it? Would it not be sufficient to pay his lordship, and many other superior officers of the Court, settled salaries, and thus totally abolish many useless and (to the suitors) oppressive fees. This would really benefit the public, and bring justice within reach of many from whose view she is now hid, by these and other equally oppressive exactions, besides rendering all these officers independent, and preventing justice from being made a matter of trade. This dead fund was furnished by the public; and who else ought to have the entire benefit of it? Can you also say whether any, and what patronage, now remains in the Lord Chancellor? Because, as this bill is intended expressly to purify and render the office independent, patronage ought no longer to exist. I feel convinced, that a man of Lord Brougham's liberal disposition will without hesitation assent to this; not that there is any fear of his lordship's making an improper use of patronage, but we cannot answer for future Chancellors: it is the *office*, not the *man*, which requires purifying.

J.

P. S. By the Chancery Sinecure Bill, I perceive that the offices of Clerk of the Crown and Clerk of the Patents are to be abolished, as from April next; and yet by the Salary Bill, they are still to be kept on foot, to receive the Lord Chancellor's fees. How is the suitor benefited by this?

BANKRUPT ACT.—PROOF OF DEBTS.

To the Editor of the Legal Observer.

Sir,

There is a defect in this act (6 G. 4. c. 16), which occasions, frequently, a great grievance. In general, creditors must prove their debts by their own oaths, agents being allowed to depose only where they have effected a policy of insurance upon ships or goods with an underwriter, or where appointed by bodies politic or public companies incorporated or empowered to sue by charter or act of parliament. I will select one, out of many instances, in which the hardship of this personal proof is apparent.

It happens frequently that foreign mercan-

tile houses, say French or Dutch, carry on extensive transactions with commercial establishments in this country, wholly through agents residing here, who are at least as conversant with the affairs as their principals, and sometimes more so. But if the house here happen to become bankrupt, the agent can only claim; and an affidavit must be despatched to the employer, to be sworn, attested, and verified, according to legal requisition. What harm could there be in the agent's proof? Why this delay and expense? Perhaps, too, the affidavit may be informal, and have to be returned for amendment. Mercantile men, though sufficiently acquainted with their own business, cannot be expected to know the ceremonials the law requires in these matters; and the foreign magistrates and notaries occasionally need instruction as much as the juror. In my own practice, I have witnessed several instances of this want of information.

Mr. Archbold, in his "Law and Practice of Bankruptcy," mentions other cases,—such as the great coal and other mining concerns in the North and West of England; and I could add to the number, were it not unnecessary to swell the catalogue. Professional experience has made many aware of the ground of complaint, and will present at once the instances of hardship. My hope is, that this public notice of the necessity of reform will not be made in vain, and that agents will be permitted to prove in all cases.

F. W. G.

SUPERIOR COURTS.

KING'S BENCH.—PRACTICE COURT.

JUDGMENT AS IN CASE OF A NONSUIT.

Under R. 69 of the first division of rules of H. T., 2 W. 4, a default in not proceeding to trial pursuant to notice, cannot be connected with a default in not giving notice of trial, so as to prevent the defendant from moving for judgment as in case of a nonsuit, after motion for costs of the day.

V. Richards shewed cause against a rule for judgment as in case of a nonsuit. Issue had been joined in Trinity Term, 1831, and notice of trial given for the Summer Assizes in that year. Costs of the day for not proceeding to trial were moved for and obtained in the following term. The plaintiff gave no notice of trial for the Spring Assizes, and judgment as in case of a nonsuit on that ground, was moved for. He submitted, that under rule 69 of the first division of Rules of Hilary Term, 2 W. 4, the present rule must be discharged. That rule directed, that "no motion for judgment as in case of a nonsuit, shall be allowed after a motion for costs for not proceeding to trial for the same default." Here the defendant had already moved for and obtained the costs of the day for not proceeding to trial, for the same default as that for which he had now moved for judgment as in case of a nonsuit.

Taunton, J.—That is not "the same default." The default of not proceeding to trial pursuant to notice, is very different from the default of not giving notice of trial. The defendant is certainly entitled to move for judgment as in case of a nonsuit.

Rule discharged on plaintiff's giving a peremptory undertaking to try at the next assizes. —*Robins* v. *Richards*, May 5th, 1832. K. B. P. C.

CHANGING THE VENUE.—PROMISSORY NOTE.

Although a promissory note is not made payable to order, the Court will not grant a rule to change the venue on the common affidavit.

Wightman moved to change the venue in an action on a promissory note, on the common affidavit. The note was not made payable to order, but on a particular day; it was, therefore, merely evidence of a promise by the defendant to the plaintiff, and therefore not within the statute[a]. There were no particular circumstances in the case.

Patteson, J.—The statute has been extended to charter parties, to promissory notes, and bills of exchange. I don't like to make these nice distinctions. Unless you lay some particular circumstances before me, I cannot grant your application.

Rule refused.—*Smith* v. *Elkins*, May 30th, 1832. K. B. P. C.

SERVICE OF RULE.

What will be circumstances sufficient to dispense with personal service of a rule.

Ball moved to make a rule absolute to refer a cause to the master to compute principal and interest on a bill of exchange. The affidavit of service of the rule stated, that the party endeavouring to serve it, on going to the defendant's residence, had found a board stuck up, on which were these words, "Messages and parcels to be left at" a particular place mentioned. The deponent went there, and saw a woman, who informed him she was in the habit of receiving messages and parcels for the defendant. He left the rule with her; and she afterwards said she had given it to the defendant. The affidavit also stated, that the defendant had left his residence six weeks before, as the deponent believed.

Taunton, J.—That is sufficient.

Rule absolute.—*Engleheart* v. *Morgan, Gent. one, &c.* E. T. May 12th, 1832. K. B. P. C.

[a] 6 R. 2, c. 2; see Tid. Prac. 604, ed. 9; 2 Chit. Rep. 418, 19.

er. Truly, Gentlemen, these three men, by
ir talking, have given great cause of suspi-
n, but whether they or Mr. Cowper are
lty or no, that you are to determine.
The Jury, having deliberated about half an
ır, acquitted all the prisoners.

SELECTIONS FROM CORRESPONDENCE.

No. XII.

AFFIDAVITS IN BANKRUPTCY.

Sir,

s. none of your correspondents have set
r correspondent ASPIRO right, (see his
r in the Legal Observer, 21st July last,)
w me to state for his information, as well
or the information of others, that all affida-
for any purpose whatever, in bankruptcy,
ther such affidavits are to be used under
n or country fiats, may be sworn before
Commissioner in Basinghall Street, or
re the Judges of the Court of Review, and
without paying anything for the oath,
ch amounts to a saving of 1*s.* 6*d.* upon
y affidavit sworn. The only affidavit that
t be sworn before a Master or Master Ex-
rdinary in Chancery, is the affidavit of the
tioning creditor, upon which the fiat issues.
e January last, I have had numerous affi-
ts sworn in Basinghall Street, for which
ve never paid one farthing. And it is well
wn, that in consequence of the loss sus-
ed by the clerk at the Public Office in
hampton Buildings, he is applying for
pensation. AMICUS CURIÆ.

CHANCERY RECORDS IN THE TOWER.

Sir,

rough the medium of your publication
night do much good by recommending
tion in the charge for searching the re
down to the year 1755, from the Si
s' Office, which are now deposited in th
r. There is a list of all the causes i
erm under each respective letter, there
here cannot be much trouble in a search
e fees payable on account of searches ar
ated for *to the Treasury*, who allow
officers of the Record Office what they
proper. Now upon a search, the fee is
; and if a copy is made, either 6*d.* or
folio; either of which, even the first,
o heavy, as the proceedings are mostly
nd if the fee on search was only 6*s.* 8*d.*
be quite sufficient, and be the means
g information which cannot otherwise
ed. SCRUTATOR.

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ought to pay the
former.
the sheriff's costs
court. He distin-
rom that class of
been accustomed
as they were ge-
appeared to be a
ue side, and a *bond*
sheriff, in those
statute from the
laced by such ad-
appear not to be
re the execution
otion for a claim,
now, he confessed
if having thus been
before the Court,

that we shall allow
re the execution cre-
not appear, to be
nt or the execution
h appear, in order to
se costs. Then, we
if we wish to decide
parties, and examine
the execution or the
Judges have, there-
draw one strict line,
osts to the sheriff.
V. Richards applied
ule on the part of the
tice of the application
given to the sheriff and
A satisfactory reason
he Court for the execu-
n appearing—
d the sheriff his costs of
nd occasion, and directed
, between the execution
dverse claimant, and the
tion to depend on the event

—*Bryant* v. *Skey*, June 6th,

OF THE WEEK.

ERAL REGISTRY.

ill probably have seen the
Committee of the House of
he subject of a General Regis-
favour of this measure for all
ns, but states that in small
transfers, which it of course
h more numerous than any
benefits of a general regis-
rbalanced by the expenses
ccasion. We may be able
number to examine more
its of this document.

THE COMMON LAW COURTS.

of the Exchequer of Pleas to
rs of all the Courts, has had
hdrawing a large part of the business of the King's Bench. Such might naturally be expected as the consequence, in all cases where a trial was anticipated; for the arrear at the King's Bench Nisi Prius Court is so considerable, that a defended cause cannot be brought on in less than twelve, and it may be eighteen months. The rapid increase, however, of the Exchequer business will probably receive a check, so soon as the Cause List of the King's Bench shall be reduced to moderate limits.

PRACTICE AT THE JUDGES' CHAMBERS.

We have inserted in the Monthly Record a report of the debate in the House of Commons on the Petition of the Incorporated Law Society, respecting the Judges' Chambers. It appears to have been very ably and judiciously supported by Mr. *Freshfield*, who presented the Petition, and it was well received by the House. We notice it particularly, in order to call attention to the suggestion of Mr. *Hume*, that instead of the attendance of the Judges being limited to two or three hours, they should in turn sit the whole morning. The *Attorney General* also recommended that the Judges should not be confined to a particular Court, but taken either from the King's Bench, Common Pleas, or the Exchequer.

Both these suggestions are important, and, if adopted, will much facilitate and expedite the transaction of business. The assimilation of the practice of all the Common Law Courts renders the advice of the Attorney General of easy adoption; and we submit, the Judges should sit in rotation from each Court, and not from any one of them in particular. The notion, however, of one of the honorable members, that two of the Bankruptcy Judges should sit constantly for this purpose, will not do. Some other means must be found, of suitable employment for their Honors. The important duty of a Judge at chambers, can be performed only by one who at other times is engaged in the general business of the Court of which he is a member: otherwise the Practice in Court, and the Practice at Chambers, will not assimilate.

THE INNS OF COURT.

We have inserted the Letter of a Correspondent on the inquiry to be made by the Common Law Commissioners into the powers and management of the Benchers of the Inns of Court. Our esteemed Contributor, "*A Cestui que Trust*," has, we think, exhausted the subject of the Misapplication of the Revenues. However, we have printed nearly the whole of the letter,

the subject so important that it cannot too frequently be brought into notice.

On the other hand, we shall be ready to do justice to those who may think, either that the present system works sufficiently well, or that the reform which is demanded need not be very extensive. As in the case of Political Reform, which *has* been carried, and that of Church Reform, which *will* be carried, so in the Law, we have ever advised that early and judicious improvements should be made by the legal authorities themselves, without waiting for the rough hand of the *Layman*, who, with a combination of zeal and ignorance, will overthrow the useful as well as the pernicious.

ATTORNEYS ADMITTED IN THE LAST FOUR TERMS.

It was shewn in Vol. II. p. 185, that the number of Attorneys admitted in the preceding four terms was 411. We find that the admissions in the Court of King's Bench since that time are as follow:

Michaelmas Term, 1831 - -	104
Hilary Term, 1832 - - -	109
Easter - - - - -	115
Trinity - - - - -	117
Making a total for one year of	445

The admissions in the Common Pleas, of persons not admitted in the King's Bench, are about 10 or 12 annually; but these, almost always, are subsequently enrolled in the latter Court, to which practitioners of any extent of practice invariably belong. The same remark, we believe, will apply to the Exchequer of Pleas.

We thus perceive the annual increase in the number of this branch of the profession for the whole of England. It was deemed material to examine the Roll of Attorneys, in order to ascertain the actual number of admissions; for it had been erroneously supposed, that all, or nearly all, who gave notice of admission, were admitted. A very large per centage, however, must always be allowed for the change of purpose between the time of notice and the time of admission. The admission must be accompanied with the payment of 25*l.* stamp duty; and unless the applicant has a view to immediate and profitable practice, he very naturally defers making the advance. A further deduction should also be made in the number of supposed practitioners, between the time of admission and that of taking out the certificate. Many who have served their articles, determine to perfect their title to practise by admission on the roll; but as the certificate can at any time be taken out, the further expense of 6*l.* is postponed till business be obtained. Instead, therefore, of the 1000 or 1200 new Practitioners annually, which has been usually supposed, (or 1400, as some of the newspapers stated) the real increase is probably not more than, if so much as 300. This, however, is quite sufficient; but still we do not think that new stamp duties should be imposed, or even the old ones continued. The less objectionable plan would be to restrain the number of clerks to be taken by each attorney, according to his standing as a Practitioner. A strict examination before admission might also be enacted.

ANSWERS TO QUERIES.

LAW OF LANDLORD AND TENANT.

RENT.—BILL OF EXCHANGE. P. 256.

1. In accordance with the general principle, that a person by taking a bill of exchange in satisfaction of a former debt, is precluded from afterwards waiving it, and suing the person who gave it him for the original debt before the bill is due, I should conclude that the landlord, having received the bill in question in satisfaction of the distress, could not, prior to its becoming due, prevent the tenant from removing his goods. Presuming that the landlord, as holder, has used due diligence, the tenant's liability, consequent on the dishonor of the bill, in respect of the rent thereby intended to be secured, revives; and thus it would appear, that the landlord has his election either to commence an action on the bill, or have recourse a second time to his remedy by distress. I am not aware of a case directly in point; but doubt not, if there be any such, some of your contributors will readily refer your correspondent to it. M.

2. A landlord may distrain for rent after having taken a *note of hand* for the amount; for it is no alteration of the debt until payment. *Harris* v. *Shipway*, and *Ewer* v. *Clifton*, Bull. N. P. 182. It follows, that if he can distrain at any time, he can prevent the removal of the goods. W. H.

3. It being a rule of law, that one contract, not under seal, cannot be extinguished by another *similar* contract; Ld. Raym. 1430; Willes, 406; 2 Stra. 1218; and that a bill of exchange does not extinguish the *original* debt, only amounting to an agreement for credit; 5 T. R. 513; 1 Esp. Rep. 5, 106, 317; 3 East, 251; I think that the amount for which this bill was given still remained *rent*, and that *when* the bill became due, it might be distrained for; see Woodfall, 5th ed. 294. Of course the landlord could not prevent the tenant removing his goods prior to the bill

becoming due, as by taking it, he suspended all right to the rent during the time it had to run. J.

4. The landlord *can* distrain, inasmuch as the first distress was an insufficient one; and he should immediately seize the tenant's goods, otherwise he will have to find out where his tenant hath "fraudulently and clandestinely" removed them, to prevent their being distrained for arrears of rent. E. M.

5. The landlord can distrain a second time, if the bill be not paid. *Harris* v. *Shipway*, Bull. N. P. 182; and *Palfrey* v. *Baker*, 3 Price, 572. And from the observation of *Abbey, J.*, in the former case, it appears that the landlord might prevent the tenant from removing his goods prior to the bill becoming due; for he says, "the note did not alter the nature of the debt until it were paid."

J. B. T.

RENT SECK.—ASSIGNMENT. P. 256.

1. If *C.* were ever *seised* of the rent, that is, if anything had been paid by *B.* to him on *account* of it, then I think he might distrain for it under 4 G. 2. c. 28. § 5. See Coke on Litt. sec. 217, 228, and 341. I do not think ——— v. *Moore* very applicable, as there the lessee reserved rent on *assigning* his term, and reserved it on the *term*. Rent can only be reserved on lands or tenements; sec. 218. The rent originally reserved by *A.* was, I consider, a good rent service; sec. 214; and became rent seck by assignment. The lessee, in ——— v. *Moore*, created a new rent, and reserved it in his term, which he assigned, *leaving himself no reversion*; therefore of course he could not distrain. If the assignee did not become *seised* of the rent (and has therefore no distress), then I think he might sue the lessee on his covenant to pay the rent. J.

2. If *A.*, on the creation of the underlease to *B.*, reserved a power to distrain for the rent in arrear, *C.* would be entitled to that benefit; but if no such *special clause* was inserted, the only remedy that *C.* can use, is to bring an action of covenant. T. T. P.

COMMON LAW.

INDORSEMENT OF DEBT ON WRITS. P. 240.

A reference to the new rule on this subject answers J.: the words are, "upon the copy of any process served *for the payment of any debt, the amount of the debt shall be stated.* An action for a libel, of course, is not an action for the payment of any debt. The process may, however, be indorsed, "This action is brought to recover damages for a tort." A.

REFORM ACT.—JOINT OCCUPIER. P. 271.

1. M. P. has misapplied the word *joint*. The 27th section refers to a right of voting by a person who occupies, "as owner *or tenant*, any house, warehouse, counting-house, shop, or *other building*, being either *separately or jointly with any land*, within such city, borough, or place, *occupied therewith* by him as *owner*, or occupied therewith by him *as tenant* under the same landlord." *B.* can only be looked upon in the character of *a lodger*, and not, as M. P. considers him, a *joint occupier* with *A.*, the tenant, and is clearly disqualified from voting. As to joint occupiers, the act gives the right of voting where the premises are "jointly occupied by more persons than one as owners or tenants." See sect. 29.

ASPIRO.

2. I think *B.* has no right to vote. The term "joint occupier" I conceive to mean one of several persons who jointly hold premises at a yearly rent which, when divided, gives each of them not less than 10*l.*, and who possess all the qualifications mentioned in the proviso to the 27th section of the act. The 29th section, referring to joint occupiers, says, "each of such joint occupiers shall, subject to the conditions hereinbefore contained, as to persons occupying premises in any such city, borough, or place," (that is, as I understand the meaning, subject to the above proviso,) "be entitled to vote," &c. X.

3. Joint occupiers are persons holding the same premises of the same landlord. *A.* and *B.*, therefore, are not joint occupiers. But the occupation of part of a house gives a vote; and *B.*, as it seems to me, has a vote under the section which is understood to give one to the occupier of chambers. W. T.

LAW OF PROPERTY AND CONVEYANCING.

TRUSTEES.—LEASE.—ASSIGNMENT. P. 271.

The assignment from *D.* to *C.* would not produce a merger of the term; for *C.* became possessed of such interest, not in his fiduciary character, but as a *bonâ fide* purchaser for a valuable consideration, which involves the question, whether *C.* has not taken advantage of his trusteeship; as a court of equity will not allow a trustee to purchase any trust property by direct means, much less will it favor indirect ones. And as to the trustees commencing an action against *D.* on the covenants in the lease, it should have been stated what violation of them had taken place. T. T. P.

QUERIES.

PRACTICE.

JUDGMENT.—EJECTMENT.—ORIGINAL.

Is it necessary, on signing judgment by default in ejectment by *original*, to enter an appearance? W. H.

COMMON LAW.

APPOINTMENT OF COMMON LAW JUDGES.

Is the Lord Chief Justice of the Court of

King's Bench appointed by writ, or like all the ther Common Law Judges, by letters patent?

B. D. F.

FATHER'S LIABILITY.—MINOR.

A minor, living with his mother, who has separated from his father, contracts a debt for necessaries. Against whom is the creditor to bring his action, the father or the minor? The father allows a trifle for the maintenance of the wife and minor, in consideration of which the *wife* has agreed not to contract on his account; *but this debt is contracted by the minor.*

C. D. E.

ELECTIVE FRANCHISE.—LAND TAX.

Prior to the passing of the Reform Act, *A.* and *B.*, the purchasers of a land tax, were entitled to vote at elections for members of parliament for the county of Middlesex. The land tax thus redeemed was charged upon certain leasehold premises, of much greater value than 20*l.* per annum, then and now occupied by *A.* and *B.*, and situate in one of the new metropolitan boroughs. Do *A.* and *B.* still retain their elective franchise for the county? or do they come within the provisions of sect. 24. of the Reform Act?

S.

LAW OF PROPERTY AND CONVEYANCING.

WILL.—MONEY IN THE FUNDS.

A. by his will, *signed* by him, but *not sealed nor attested by any witness*, gave all his real and personal estate to his brother *B.*, and died, leaving his said brother and two sisters his next of kin. The will has been proved by *B.* by consent; and the question is, whether (as the will is not attested by *two* witnesses) the brother and sisters are not entitled equally to such part of the testator's personal estate as consists of *money in the funds?* The testator's debts have all been paid.

Y.

VOLUNTARY SETTLEMENT.—CREDITORS.

In the year 1826, *A.*, in solvent circumstances, by a settlement after his marriage, in consideration of *natural love and affection only*, settled 10,000*l.* upon his wife and children. He has now become a bankrupt. Is the settlement valid against the creditors?

A SUBSCRIBER.

MISCELLANEA.

GENTOO ADMINISTRATION OF JUSTICE.

Amicus Curiæ.—If a learned man is present when an affair is examined before a magistrate, although the magistrate should not delegate him as examiner, yet he has the liberty of uttering his sentiments on the case in point.

Gentoo Attorney.—If the plaintiff or defendant have any excuse for not attending the Court, or for not pleading their own cause, or on any other account excuse themselves, they shall, at their own option, appoint a person as their *vakeel* (attorney). If the vakeel gains the suit, his principal also gains; if the vakeel is cast, his principal is cast also. In a cause where the accusation is for murder, robbery, adultery, eating prohibited food, false abuse, false witness, destroying the property of a magistrate, a vakeel must not be appointed to plead and answer; the principals shall plead and answer in person; but a woman, a minor, an ideot, and he who cannot distinguish between good and evil for himself, may even in such causes as these, constitute a vakeel.

Plea and answer.—Special pleading seems here to have arrived at perfection: The plaintiff shall give an account of the circumstances in such manner that the words be *few*, and the meaning *extensive*, and that *no doubt* of the sense of his speech may arise in the minds of any of his audience. In the same manner the defendant shall return his answer.

Witnesses.—A minor until 15 years of age, one single person, a woman, a man of bad principles, a father, and an enemy, may not be witnesses; but if the father and the enemy are men of good disposition, and speakers of truth, and men are well acquainted with the goodness of their disposition and veracity, these two persons may be witnesses. An old man of eighty is also excluded; so are perpetual wranglers.

Mode of examination.—He who means to examine a witness, having bathed himself, shall put his questions in the tenth *ghurrie* (twenty-four minutes) of the day. The witness also, having bathed himself, and turned his face towards the eastern or northern quarter, shall deliver his evidence. The examiner shall ask the witness with civility and respect, according to his rank. The Bramin is merely desired to explain what knowledge he has of the affair. The Chehteree, or second tribe, are also treated with civility. The others are called upon under the threat of severe punishments, to declare the truth, and are interrogated with as little ceremony as the "upon your oath, fellow," is used in some other countries.

The Legal Observer.

VOL. IV. SATURDAY, SEPTEMBER 8, 1832. No. XCIX.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

DISSERTATIONS ON THE LAW OF SCOTLAND.

No. I.

THE SOURCES WHENCE THE LAW OF SCOTLAND IS DERIVED.

THE intercourse between England and Scotland is now so constant, and is increasing so fast, that some knowledge of the law of Scotland is become of daily importance to the English practitioner. It is not intended in this series of papers, which have been undertaken with the intention of giving a general view of the Law of Scotland, to enter into the minuter parts of the subject. Those parts only will be examined which appear to be useful in this country; and although no great familiarity with the subject is necessary for this purpose, yet the information given, it is hoped, will be found to be correct.

It will first be necessary to consider the sources whence the law of Scotland is derived.

The law of Scotland admits of the usual division into, 1. Written law; 2. Unwritten law.

1. The written law of Scotland is derived from several sources; but chiefly from the Roman law, the Canon law, the Statutes of the kingdom of Scotland down to the Union, and, since the union of the two kingdoms, those made in England, and the acts of Sederunt.

The Roman law, as is well-known, consists of the Pandects or Digests compiled by the Emperor Justinian, his Institutes, the Code published in 534, and the Novels. The Canon law consists of the rules promulgated from time to time by the Churchmen at their councils, compounded partly of the rules of the Roman law, and partly of the exclusive maxims of these ecclesiastical legislators. It consists of the *Decretum*, a Collection made by Gratian, a Benedictine monk, and the *Decretalia*, which were collected by Pope Gregory IX, about a century after.

The Roman and Canon law compose what is strictly the *Common law* of Scotland. The meaning of this expression in England is the unwritten law, derived by the long continued customs of the country; but in Scotland, both in the statutes and in common parlance, by the *Common law* is understood, either the Roman law by itself, or in conjunction with the Statute law. If the expression "*the common laws of the realm*" is used, the ancient usages of the country are meant, whether derived from the Roman law, the feudal customs, or whatever other source.

The precise weight of the Roman law is a matter of some doubt. Sir George Mackenzie has declared it to have great influence, except when the express law or custom has receded from it[a]. Lord Stair[b] and Craig[c] do not seem inclined to give it equal weight. Its authority has, however, been repeatedly recognized by the Scotch Parliament; and Erskine concludes, after

[a] § 7. h. t.
[b] Instit. B. 1, tit. 1. § 12 & 16.
[c] Defendis, lib. 1. Dieg. 2, No. 14.

stating these opinions, that great weight is to be laid on the Roman law in all cases not fixed by statute or custom, and in which the genius of the Scotch law will suffer it to be applied; and as few statutes have been made in the matters of contracts, transactions, restitutions, servitudes, tutories, and obligations, it is singularly useful in determining controversies arising from those heads of the law; but that where the Roman law appears to have been founded on a subtlety peculiar to their system, it were absurd to pay the smallest regard to it.[d]

From the great power and influence of the clergy in Scotland, the Canon law became the law of Scotland, in most articles of private right, as well civil as ecclesiastical; but since the Reformation it has declined, and is now of small authority, except in questions of tithes, patronage, and a few other ecclesiastical matters, where the canons are consistent with Protestant principles.

The Statute law of Scotland is imperfect and defective. The most valuable of the public records were carried off into England by Edward I., and afterwards by an order of Oliver Cromwell, about the middle of the seventeenth century. The earlier statutes of the kingdom, therefore, have but a questionable authority, as much doubt has been thrown upon their authenticity. The statute law of the first kings has been preserved rather by treatises written at their request, and bearing their authority, than by the very acts themselves. Thus the treatise called *Regiam Majestatem*, and at some distance from this, the tracts called *Quomam attachiamenta Iter camerarii*, and others in Skene's Collection, have a sort of middle place between the actual statutes and the private labours of individuals.

The proper Statute law of Scotland, therefore, in fact, commences with the acts passed in the reign of James the First of Scotland.

Another part of the written law of Scotland consists of the acts of Sederunt, which are ordinances made by the Court of Session for regulating the forms of proceeding to be observed in the matters brought before them. This is a power intrusted to every superior court of justice, and is indeed necessary to its existence.

2. The unwritten law (under which head some writers class the Roman and Canon law) consists of those customs and usages which have been known from time immemorial, and have thus received the tacit consent of the supreme power of the State, and of the decisions of the Court. These customs are generally so notorious as to require no proof; but if they admit of reasonable doubt, evidence of the long and immemorial usage must be given.

All usages and customs are either universal or local. It is a singular fact, that in Scotland almost every custom is universal. Indeed, a high authority gives only one complete example of a local custom in the whole kingdom.[e]

The decisions of the Court of Sessions have been long preserved, and where they have been uniform, are entitled to great attention, particularly if of a modern date. They have not, however, the same weight as in England; although they bind the litigating parties, they create no obligation on the judges to follow them, if they shall appear to them to be contrary to the law. This rule equally applies to the decisions of the House of Lords as to those of the Court of Session, inasmuch as on appeal the House acts as a body of judges, and not of legislators, and their opinions are not binding, as concerns the parties, even on the inferior Court.

In conclusion, it is proper to observe, that the laws of England, except so far as they are derived from the parliament of the united kingdom, and expressly referring to Scotland, have no force or effect whatever in the latter country. It has its own separate and independent body of laws. This was expressly enacted at the union of the two kingdoms in 1707, when all the laws of Scotland concerning private right, whether statutory or customary, are reserved entire, and not to suffer any alteration, except for the evident utility of the subject.

[d] Instit. Book I. tit. 1. edit. 1828, by Ivory, p. 17. In a former page (p. 10), it is said, "In England, it (the Roman law) is of considerable authority in the Courts of Chancery, Admiralty, and Arches." This is incorrect, as far as it relates to the Court of Chancery. It is true that some of the maxims of the English courts of equity are borrowed from the Roman law; but they are only of authority as having been so adopted. The Roman law has no direct authority in the Court of Chancery.

[e] Erskine, B. 1. tit. 1. p. 19. This is the udal right of Orkney and Shetland, where some lands, having never been enjoyed by charter and seisin, are still held without any title in writing, the proprietor having merely the symbolical possession of the land by the delivery of a stone or staff. This custom accords precisely with the ancient mode in England of completing a feoffment, before a charter or deed was introduced.

On the THIRD REPORT of the REAL PROPERTY COMMISSIONERS.

(*Continued from p. 276.*)

The second part of this Report is devoted to the consideration of Contingent Remainders, Future Estates, and Perpetuities.

The nature of Contingent Remainders is first explained. They were the earliest attempts made to meet the contingencies of family settlements, and were introduced long before the Statute of Uses. The peculiar rules relating to them are mentioned; the conflicting opinions as to where the fee vests until the contingency happens; that they require a freehold to support them; that they must vest during the particular estate, or *eo instanti* that it determines; and the doctrines relating to their destruction, which are stated to be "not only founded on narrow principles, but subversive of the manifest intention of the parties," and therefore to require revision. The injustice of the present rules are thus stated, and the remedies proposed:

Where an estate is conveyed to *A.* for life, with remainder to his first and other unborn sons in tail, with remainder to *B.* in fee, it can scarcely be contemplated by the parties making the conveyance, that *A.* and *B.* will have the immediate power of destroying the remainders to the first and other sons of *A.* which, until the birth of a son, they unquestionably have, either by a surrender from *A.* to *B.*, or by a conveyance from *B.* to *A.*; and still less, that *A.* alone should have the power of doing the same by feoffment, fine or recovery. The artificial practice of limiting estates to trustees, for preserving contingent remainders, by which instruments are rendered unintelligible to unprofessional persons, shows, in a remarkable manner, the opposition between the rule of law and the convenience of mankind.

It may be added, that the rule of law was not applied by courts of equity to equitable contingent remainders, or the analogous equitable estates and interests. It was early settled, that such interests are not capable of being destroyed by the act of the owner of the preceding estate.

In the year 1783, a bill was prepared, by the late Mr. Shadwell, for preserving contingent remainders against the tortious acts of the tenant for life; but for some reason not known, it was never passed. Merely to secure contingent remainders from destruction by tenant for life, seems scarcely sufficient to meet the inconveniences of the present system; and we therefore propose that a contingent remainder, where the particular estate may determine before the period of the vesting of the remainder has arrived, shall take effect as if it had originally been a future estate (becoming, in that case, liable to the rules prescribed for restraining perpetuities) and that the union of the particular estate, and the next immediate estate in remainder, shall not have the effect of destroying it.

If the above proposal, to prevent contingent remainders in all cases from being liable to be destroyed by the act of the tenant of the preceding estate, or by the premature determination of that estate, be adopted, it will be necessary to make provision for the disposition of the intermediate rents and profits, in those cases, after the determination of the particular estate, before the happening of the contingency. There are two modes of providing for this event; the one, to give them by way of resulting use to the grantor, or his heirs, or persons deriving title through him; and the other, to give them to the person entitled to the first vested estate. We prefer the latter mode; for, generally speaking, a settled estate is wholly withdrawn, or separated from the remaining unsettled estates, so as not to leave any ground for supposing that the settlor meant any interest in it to remain undisposed of.

It is another rule of law, that a contingent remainder limited to several individuals, as a class, vests in those only who are in existence at the determination of the particular estate, to the exclusion of others who may come into existence afterwards. Thus, where an estate was devised to *J. H.* for life, and, after his decease, to all the children of *S. M.* "begotten, and to be begotten," it was held, that it vested in five children, who were born in the lifetime of *J. H.*, and that four others who were born after his decease, were excluded; although, in the same will, another estate devised to the children of *S. M.*, in the very same words (but without any previous life estate), vested in all the nine children. The ground of the distinction was, that the latter gift took effect as an executory devise, which the former could not, because (as it was held) it might take effect as a contingent remainder; and the maxim of law is (as already stated), that what may take effect as a contingent remainder, shall never be an executory devise.

Other cases, involving similar hardship, have not unfrequently occurred in practice. The same consequence might arise upon a devise in favour of grandchildren, nephews or brothers, or even classes of persons still more indefinite or numerous. A case did occur in Lord Mansfield's time, in which a contingent remainder took effect in favour of twenty-one grandchildren, because (as his lordship laid it down), they were all in existence. It must be presumed, that in both the cases we have adverted to, the testator's bounty was meant to extend equally to all the objects; yet it depended upon a mere accident, and was the effect of a mere technical rule, that his intention was defeated in the former, and took effect in the latter. This is a state in which, we think, the law ought not to be allowed to remain, but at the same time, we believe it will admit of only a partial remedy; the relief cannot be carried further than the case of children of persons in

existence at the determination of the particular estate. With respect to remainders in favour of larger or more remote classes, the operation of the restrictive rule, may be considered likely to be productive of good, as often as of evil. We therefore recommend, that where a contingent remainder shall be limited to a class of persons, described as children of some person or persons, and at the time when the same shall take effect in possession, the parent or parents shall be living, the title or interest of the persons, taking under such remainder, shall open, to let in after-born children. It is obvious, that this will be no more than an assimilation of the law of contingent remainders to that of executory devises, in a case where no substantial distinction between the two exists.

A contingent remainder is not transferable at law, except by a fine; and the mode in which a fine operates as a transfer, is perhaps scarcely well settled.

This rule applies to all contingent remainders. It embraces those cases where the limitation is to take place in favour of one or more of several persons, and is only contingent, because it is not ascertained in which of them it will vest (as a remainder to the survivor of two or more persons, or to such of the children of *I. S.* as shall survive him); it embraces those where the contingency respects only the event on which the remainder is to vest, the person to take being in existence, and ascertained (as a limitation after the death of *A.* if *B.* shall return from Rome to *C.* in fee): it also embraces those cases in which the limitation is to a person not in existence, (as to the first son of *A.* who has no son, or to the right heir of *I. S.*, a living person.) Yet it requires but little consideration to see that these cases are very different as regards this point. In the cases first mentioned, we see no sufficient reason which should prevent the contingent benefit from passing by the same sort of conveyance, or transfer, as any other species of interest. In the fourth case, the interest is clearly incapable of transfer; and in the fifth, although the existence of a person filling the character of heir apparent, or heir presumptive of *I. S.*, may seem to make a difference, we think it not advisable that a power of transferring such an interest should be given.

Equity has not adopted the rule of law, and has allowed contingent remainders of these kinds to be transferable, or (which is the same thing) capable of being bound by contract. Various reasons have been assigned for the rule of the common law to which we are now adverting; that given in some books is, because the contingent remainder is a mere possibility, and the owner of it not in the seisin; another reason which has been given is, that a grant at common law, which was the proper mode of conveyance in the case of remainders and reversions, required attornment to perfect its operation, and that attornment was altogether inapplicable to the nature of a contingent remainder. We do not think it necessary to enter into an examination of these reasons, further than to observe, that both are technical and unsatisfactory. It is sufficient to say, that a restraint upon alienation at law, when no principle of reason or policy can be adduced to justify it, and where no corresponding restraint exists in equity, is a defect in the law which it must be both desirable and safe to remedy; and we therefore propose an enactment which shall have the effect of rendering contingent remainders, and other contingent interests, transferable at law, with the exception we have mentioned. This, we are aware, would extend to many new cases, the uncertainty of titles, which already exists as to all cases of vested estates not in possession; and we should therefore hesitate to recommend its adoption, unless a general register were established, which would remove the danger altogether.

The rules of the common law as to Future Estates are next explained; that freeholds *in futuro* were not allowed to be created; that no limitations were allowed to defeat a fee previously vested,—the obvious inconvenience of these rules, and their modification by the Statute of Uses, by the introduction of springing and shifting uses and executory devises, which by their pliability are adapted to every kind of provision that can be required in a family arrangement. The only alteration proposed in the law on this subject is, that estates and interests arising by way of springing or shifting use, or executory devise, may, before they become vested, be transferrable at law as well as in equity. We would extend this to expectancies and possibilities, which may now be transferred in equity for a valuable consideration[a], as the reasoning of the learned Commissioners applies equally to them.

The existing law as to Perpetuities is then briefly stated. "No period of perpetuity," they say, in the margin, "was known at the common law;" meaning thereby, that no restraint as to the creation of future estates or interests existed. The modern attempts to create them are then mentioned. 1. By limiting[b] estates to one for life, and afterwards to every one who should be his heir for life; which has been held to be void beyond the first estate for life to the first heir. 2. By powers of revocation, authorizing the conversion of estates tail into life estates. 3. By introducing

[a] *Holson* v. *Trevor*, 2 P. Wms. 191. *Wright* v. *Wright*, 1 Ves. 409. *Whitfield* v. *Tanford*, 1 Ves. 391.

[b] The marginal abstract, in this part of the Report, is careless and incorrect.

springing and shifting uses, executory devises, and executory trusts. 4. By introducing a great number of lives, and by trusts for accumulation; and here instancing the case of Mr. *Thellusson*, and the more recent case of *Bengough* v. *Edridge*. Some other doubtful and unsettled points relating to this subject are then stated.

They consider whether the existing rule as to perpetuities, which embraces a life or lives in being, and twenty-one years and some months afterwards, can be altered. And, first, as to the lives in being. The difficulties on this head are well stated; and they conclude by recommending that the rule should be thus restricted: "First, that lives shall not be *arbitrarily* taken for the purpose of postponing the vesting of a future estate or interest; and, secondly, that lives shall not be made use of for the purpose of founding a term or period within which to create future estates or interests, which (if limited to take effect out of an estate of inheritance) would be void, as infringements of the rule against perpetuities." We doubt very much, however, whether these enactments will remedy the evils of the present state of the law. As to the period of perpetuity, exclusive of lives, the Commissioners propose to declare, that the period during which the vesting of a future estate or interest may be suspended, must exceed the life of a person, or the survivor of several persons, born or *en ventre sa mere*, and twenty-one years, to be computed from the dropping of such life, or the minority of some person *en ventre sa mere* at the dropping of such life, and ascertained for that purpose by the instrument creating the limitation.

Some minor points are then discussed, and some inconsiderable and minute alterations proposed. The subject is of great interest, and we refer our readers to the report itself[c], as, in this part of it particularly, it is not only valuable as containing the proposed alterations, but as a correct and able statement of the existing law.

[*To be continued.*]

PRACTICAL POINTS OF GENERAL INTEREST.

No. XXX.

FOREIGN CREDITORS.

A foreigner who always resides beyond sea, has been decided not to be bound by the Statute of Limitations. *Strithorst* v. *Græone*, 2 Bl. 723. S. C. 3 Wils. 143. The following case, the circumstances of which are very interesting, seems, to a certain extent, to qualify this doctrine. The other cases on the point are *Gillespie* v. *Alexander*, 3 Russ. 130. *Lesley* v. *Hogg*, 11 Ves. 602. *Angell* v. *Haddon*, 1 Madd. 529. *Thomas* v. *Powell*, 2 Cox. 394.

The intestate, who had filled the office of Russian consul in London, died in the year 1807. A bill was filed in May, 1814, by his infant children against his administratrix, the widow, who had married again, to have the usual accounts taken, and praying, among other things, that the plaintiff W. Greig, as one of the intestate's two children, might be declared entitled to one third part of the clear residue of the personal estate in his own right. The usual reference having been directed at the hearing, the Master, in June, 1817, made his report, stating that he had caused advertisements to be published in the *London Gazette*, and certain other newspapers, for creditors, and that no creditor had come in and proved any debt. On the 21st of June, 1817, the cause was heard on further directions; and under the decree then made, the costs were paid, and the whole of the funds apportioned and distributed. As the plaintiff was then an infant, his share (which, in consequence of his brother's death, augmented so as to become four-ninths of the whole fund) was carried over to his separate account, and an annual allowance for his maintenance and education was directed to be paid out of the dividends.

In March, 1825, an application was made by petition, on behalf of the ambassador of the Emperor of Russia, praying he might be at liberty to go in before the Master, and prove a debt alleged to have been due from the intestate to the emperor, and that 21,000*l.*, bank 3 per cents., standing to the infant plaintiff's account (the only part of the intestate's estate then remaining in the name of the Accountant-General) might not be sold until the Master had made his report; and the Vice-Chancellor made an order accordingly. A petition of appeal was afterwards presented against this order, and on the 28th July, 1825, the appeal came on to be heard before Lord *Eldon*, C., when the question which it raised was fully argued. Before any judgment was given, however, the plaintiff attained his majority, and he thereupon, in November, 1826, presented another petition to the Lord Chancellor (*Eldon*), praying that the stock and money standing to his separate account, or such part thereof, less than the whole, as his lordship might think just with reference to the claim on behalf of the Russian government, might be transferred and paid to him. Upon the latter of these petitions his Lordship directed that the sum of 8,000*l.* should be paid to the plaintiff, there being still a fund in Court standing in his name, which was amply sufficient to cover the

[c] See the Report, printed *verbatim* in Monthly Record for August.

amount of the demand. But upon the appeal petition, although the matter was several times mentioned and discussed, his Lordship expressed considerable doubts, and eventually he resigned the great seal without having made any order on the subject; and it now became necessary to have the appeal re-heard. An application by the plaintiff, that the whole of the fund, standing to his separate account in the cause, might be transferred and paid over to him, was brought on at the same time with the appeal.

The *Lord Chancellor* (*Brougham*). — The intestate in this case died as far back as the year 1807, and the persons now claiming against his estate, on behalf of the Emperor of Russia, are public officers, and he was himself a public officer of the Russian government; and they, therefore, must have known of his death immediately after it took place, and of the claims which that government had against him. In 1817 a final decree was pronounced, and under that decree the administratrix took out her share of the estate; and the remainder of the fund in Court, amounting to four-ninths of the whole, was carried over to the account of the plaintiff, Mr. W. Greig, who was then an infant. Under these circumstances, it would, in my opinion, be unreasonable and unjust that the share now remaining in Court should be charged with the whole debt; and not, as was the opinion repeatedly expressed by Lord *Eldon*, and in which I fully agree, to the extent of four-ninths only. To that extent, therefore, I think it proper that the agents of the Emperor of Russia should be at liberty to go before the Master, to prove such debt as they may be able to prove, as a debt due from the intestate,—subject, however, to such defence as the party might have availed himself of, in case a bill had been filed against him. Mr. Greig, I think, should be at liberty to take out the whole of the fund, with the exception of a sum equal to four-ninths of the amount of the present claim. *Greig* v. *Somerville*, 1 Russ. & Myl. 338.

THE NOTE-BOOK OF A RETIRED BARRISTER.

In the number for the present month of Fraser's Magazine, we observe an article of the above title, and bearing internal evidence of accuracy. It is written also with good taste; and though not so entertaining as Sir Jonah Barrington's Sketches, it is sufficiently interesting to induce us to lay a portion of its contents before our readers.

It contains reminiscences of Lord Mansfield, Mr. Justice Willes, Mr. Justice Ashurst, Mr. Justice Buller, and Lord Kenyon, —names sufficiently familiar to attract the attention of both the professional and unprofessional classes. The writer also notices the leading men of the time at the Bar; but whose reputation, with scarcely an exception, is but little appreciated by the present generation. They were Sir James Wallace, Mr. Lee, (familiarly called Jack Lee,) Mr. Howarth, and Mr. Cowper.

To take the Judges first in order,—we may advert to the remarks on Lord *Mansfield*, who appears to be an especial favourite of the "Reminiscent." After eulogizing his taste, genius, and polished manners, we are presented with the following record of his kindness and attention to the Students at Law:—

"They were admitted to a seat on the bench with him, and allowed there to take their notes without interruption. The present Lord Grenville was a contemporary student with me; he at all times sat on the bench, on the right hand of Mr. Justice Ashurst, in which place he took his notes. This mark of attention, shewn only to him when the court was full, was considered as a compliment to his rank. At *nisi prius*, every student of the four Inns of Court enjoyed an equal indulgence.

"The conduct of the king's counsel was distinguished by similar courtesy: we were invited to sit within the bar, as affording us a greater facility in taking notes; and during the whole period that I was a student, mine were taken within the bar, sitting near to Mr. Thomas Cowper, the king's counsel. I owed the situation to no personal introduction; I was a perfect stranger to him; but a liberal and gentlemanlike feeling seemed to pervade the whole court over which Lord Mansfield presided, and of which he displayed so admirable an example."

We omit the observations on Mr. Justice *Willes*, for the whole of them are personal and severe. Those on Mr. Justice *Ashurst* are more to our liking—particularly the following, which may be considered as his judicial, rather than personal character:—

"He had the character of being an able lawyer, to which the judgments which he pronounced while he presided in the King's Bench fully entitle him. It may detract something from his claim of personal merit, that he had the able assistance of Mr. Justice Buller; but it never was disputed that the decisions of that period rank as high, in point of legal authority, as any which took place in it when the court was full.

"On the bench he exhibited the most inflexible gravity of countenance, an immobility of features which never relaxed, and a solemnity which never forsook him. He equally preserved the dignity of silence, and abstained sedulously from a waste of words. This had the appearance of apathy and inattention, which did not serve to improve the natural expression of his countenance; but that want of attention

was in appearance only. When he came to deliver his judgments, they were always correct, and, from his apparent inattention to the arguments, surprised by their accuracy. He stated the points of the case with brevity and precision, and they displayed no want of learning or discrimination."

The fullest and most satisfactory sketch is that of Mr. Justice *Buller*, whose person and stile of elocution are thus described:

"He possessed a countenance marked by intelligence which could not be overlooked, and lighted up by genius which could not be mistaken. These at once conveyed the powerful impression of superior talents, and every sentence which he uttered confirmed the impression which they had made. The animation and expression with which he spoke, was imposing and impressive, and the earnestness of his delivery, commanded alike attention and conviction. From the distinctness of his voice, not a word was lost, and this gave effect to his language, which was clear and correct, but without any affectation of ornament or classical allusion. His summings up of evidence to juries were master-pieces of conciseness and perspicuity."

His talents and legal acquirements are next considered. His arguments at the bar are stated to be distinguished for ingenuity, research, and sound law.

"His rise in the profession kept pace with his claims to advancement; and he was raised to the bench at an earlier age than any English judge who had preceded him. This was attributed to the influence of Lord Mansfield, who, after so many years of judicial labour had passed over his head, began to feel the want of assistance. This he sought to derive from the relief which Mr. Buller's talents and information were calculated to afford him; and the selection of him, though at so early a period of life, was such as might have been expected from that great man, and fully justified the choice which he had made. Mr. Justice Buller was at once found to be eminently qualified to fill the situation to which he had been appointed.

"From the time that Lord Mansfield had withdrawn from sitting at *nisi prius*, Mr. Justice Buller took his place, and the business of that court rested entirely upon him. That seat was never filled with greater ability, nor its duties discharged with sounder judgment, with more pure impartiality, with more extensive legal knowledge, or with more unwearied attention.

"Mr. Justice Buller possessed, to a degree which I never saw equalled in any other judge, the distinguished gift of seeing at a glance the point upon which every case before him turned; he stripped it at once of all circumstances which did not go to the merits, and to these alone he kept the evidence strictly confined. The effect of this, was to shorten the trial of causes, as it prevented the excursive flights of imagination in which counsel too frequently indulged, to the waste of the time of the court, and repressed the idle display of ignorance or vanity, in raising points which could decide nothing, and taking objections as irrelevant as untenable. By such means the cause-paper was got through at the end of every sitting; and the suitors of the court were relieved from the anxiety of suspense, the torment of *remanets*, and the impoverishing punishment of refreshing fees.

"Precipitancy of decision was imputed to him as a fault; but it was the decision arising from talent, which saw at one view the bearing of the facts upon the doubtful points of the case, and the principles of law to which only the attention should have been directed. He therefore ruled his points with a rapidity which nothing could equal but the learning and accuracy by which they were invariably distinguished."

It appears to have been generally expected that on the retirement of Lord Mansfield, Mr. Justice Buller would have been promoted to the Chief Justiceship; but he was passed by, and Lord *Kenyon* selected. The integrity and independence which Mr. Justice Buller had evinced, and the ability with which he had discharged the duties of the office, during the absence of Lord Mansfield, placed the fitness of the learned Judge beyond all question.

"The length of time, also, during which they had devolved upon him, gave him a claim for his services not to be inconsiderately rated, or lightly overlooked. They were, however, (but for what reason never transpired,) considered as insufficient to give him a title to that high situation, when put in competition with those of Lord Kenyon; and the latter was appointed Lord Chief Justice. But who can, with any deference to truth, or to the justice due to private character, in the absence of all proof, presume to assert, that a failure in attaining that appointment proceeded from any objection to his honour or moral character. Lord Kenyon as a lawyer possessed the highest reputation. He then held the office of Master of the Rolls, and had been Attorney-General. The filling of the latter office has been usually considered as giving a title to the situation of Lord Chief Justice when a vacancy happens; and when Lord Kenyon accepted the Rolls, the very advanced age of Lord Mansfield promised not a distant vacancy in the King's Bench."

Mr. Justice Buller had been accustomed, even during the time of Mr. Justice Ashurst, his senior, to dictate to the Court. When Lord Kenyon took his seat as Chief Justice, the situation of Mr. Justice Buller was materially changed:

"Too able a lawyer to require the assistance of others to enable him to form an opinion, and too proud to ask it, Lord Kenyon never

condescended to consult the other judges, or to ask their opinions. He did not wait for the expression of their approval or dissent, but made rules absolute, or discharged them, upon his own judgment only. On arguments he pronounced an unhesitating opinion, and left the other judges to agree with, or to differ from him, as they thought fit; the latter was of very rare occurrence. He felt his superiority, and displayed it with a want of feeling bordering on contempt.

"To sink into the low and level consequence of his brethren, who had been used to look up to him, was ill suited to the high mind of Mr. Justice Buller. He bore it for a few years, when, forsaking the court in which he had practised for all the antecedent years of his life, he retired from the King's Bench into the Common Pleas. He became a puisne judge of that court in 1794, and died in the year 1800."

Of the leading counsel whom we have named, Mr. *Howarth* is dismissed with a few lines. Sir *James Wallace*, who was either of Cumberland or Westmoreland, is described as peculiarly uncouth in tone and language, but as making up in matter whatever was wanting in grace. His character for legal knowledge always commanded the respect and attention of the Court: his arguments were sterling law. Mr. *Lee* is distinguished for a conflict with Mr. Erskine, when the latter first went to the bar.

"With equal talents and ambition, Erskine adopted the wise course of flying at the highest quarry. He felt that a victory gained over a man of his own standing conferred no honour, but over one of established reputation and high character in his profession, it would have the effect of attracting public attention towards him, and of raising his own reputation in the eyes of the world. It had the further recommendation, that it was a safe sort of attack, as success would be attended with honour, and defeat with no disgrace. Lee seemed to present no formidable obstacle to Erskine's views. His talents were far from being of the first order. His address and manners, though coarse, had served to recommend him, and to those he owed much of his success, by the assumed frankness of natural and unpolished good nature. Whether he saw that Erskine contemplated to enter into professional competition with him, cannot be known. Erskine had never studied to propitiate his friendship, or to conciliate his good graces, either by courting his society, or by an affected deference to his talents. This might have raised some suspicion of his intentions, and awakened the fears of Lee as to his views, with anticipating apprehensions of the effect which it would have on his business at the bar; and that it roused his spleen he could not conceal, nor could the prudence of old age control his exposure of it.

"They were counsel on opposite sides, before a committee of the House of Commons, on a contested election. Erskine having occasion to observe on part of the speech before delivered by Lee, in giving the words of it, humorously affected to adopt his singular style and action in speaking. He crossed his arms on his breast, and hit off with some degree of humour the tone of Lee's voice and manner of concluding his sentences. It was done in the most perfect good humour, but was not so received by Lee. Erskine had in his early life been intended for the navy: he had quitted that profession, and gone into the army; which latter he also relinquished for the bar. When it came to Lee's turn to reply to him: 'This gentleman,' says he, 'they tell me, has been a sailor; they say, too, that he has been a soldier; and will now probably finish his career as a mountebank at Bartholomew Fair.'

"This splenetic, unmannered, and unmerited observation, while it shewed the rancour of the speaker, was of advantage to Erskine. It was retailed as a proof of Lee's jealousy of what might be expected from his promising talents, and the envy of his increasing reputation. Every one felt that detraction is only levelled against those whose merit casts a shade upon the slanderer, and which, while he hates, he is forced to acknowledge. The shaft flew over Erskine's head, and recoiled on him who threw it."

Mr. *Cowper* was the junior of the King's Counsel of that day, and is chiefly characterized for his wit and agreeable manners. His business at the bar was not extensive, nor (according to our critic) his manner of doing it to be praised. Its best recommendation was its pleasantry, which never forsook him, nor was an opportunity for a joke ever suffered to escape. His efforts are thus characterized:

"They were for the most part puns, made on the observations or arguments of the counsel who surrounded him—ludicrous or playful comments on their language or speeches—whimsical in their conception, and inoffensive in their delivery. He bestowed them on the court as the occasion suggested. In a case of prohibition from the court of the Bishop of Salisbury, of which Dr. Calvert was the judge, it became a question whether that judge had decided on the whole of the question, or upon a collateral point only. Cowper had to support that it was the latter only. When the opposite counsel were contending that the doctor had decided on the whole question, 'You want,' says Cowper, 'to force *Calvert's Entire* down our throats.'

"With the bar who surrounded him, he kept up a continual cheerfulness of conversation and pleasantness of remark, wholly free from satire or ill-nature. He possessed, however, talents for wit of a higher order than that of which I have furnished the examples. Many of his *bon mots* are still in the recollection of the profession."

ON THE EXEMPTION OF EXECUTORS, &c. FROM PAYMENT OF COSTS.

It has always appeared to me, that the rule of law by which plaintiffs, suing in the character of executors or administrators, are held *not* liable to pay costs to the person sued, is so utterly without principle for its basis, and so frequently oppressive in its operation, that it ought never to have been established. It has frequently been remarked, even by our Judges, that the privilege in favour of executors, is too great; and in *Belland* v. *Spencer*, 7 T. R. 358, Lord Kenyon bore testimony to its injurious tendency. "We all remember (observed his Lordship) a variety of actions improperly brought by executors, and which would not, perhaps, have been brought, had it not been for the privilege which they have of being exempt from the payment of costs."

Two reasons have been assigned why such exemption has been allowed; but, on examination, I think it will appear that both are unsatisfactory. The most usual reason is, that executors and administrators are presumed not to be cognizant of the true circumstances under which they may be called upon to sue. But who does not detect the insufficiency of such a reason, when applied to those cases in which an executor or administrator brings a *speculative* action, depending entirely on a question of *law*, and where there is no dispute or doubt as to facts? The privilege, we know, is confined to executors plaintiffs; for, when defendants, they are equally liable to costs with all other persons. Now, who can discover why the privilege, if it were properly conferred on executors plaintiffs, should be denied executors defendants? Indeed, one would rather suppose the latter, of the two, should be privileged, for they are certainly as much (and perhaps more) likely to be ignorant of the contracts and dealings of the deceased than plaintiffs would be. Before plaintiffs sue, they *must be supposed* to investigate the facts, and satisfy themselves as to their chance of success; whereas defendants may be often taken by surprise, and have no opportunity for deliberate investigation.

But some have thought the "sound principle" of the exemption in question is founded, not on the supposed ignorance of the parties, but on the language of the statute 23 Hen. 8. c. 15. I do not know to whose ingenuity the profession is indebted for discovering the right of executors and administrators (plaintiffs) to the exemption; but I cannot, from reading the statute, agree that such a claim is well founded. In *Tattersall* v. *Prout*, 2 B. & P. 253, Lord Eldon says, "the doctrine *seems* to be founded on this act, attending to the language of which, perhaps, we may be authorized to say, that the sound principle on which the exemption rests, is *not* the degree of ignorance under which they may be supposed to lie, but is founded on the words contained in the statute on which costs are to be paid"—and his Lordship quotes the following passage from the statute: "Any action, &c. upon any specialty made *to the plaintiff or plaintiffs*, or upon any contract supposed to be made between the plaintiff," &c. Now, if it can be successfully contended, that from those words is found a sound principle for the exemption in favour of executors and administrators plaintiffs,—why, it may be asked, do not the same words secure the same privilege to executors and administrators defendants? Executors and administrators are *not* particularly excepted out of the statute. (*Smith*, exor. v. *Rhodes*, T. 26 Geo. 3, K. B.) They are not mentioned. Why, then, is so marked a distinction made between executors plaintiffs, and executors defendants? Let it be observed, that when *first* speaking of the parties who may thereafter sue, and who shall pay costs, the words of the statute are "any person or persons." How, then, are executors and administrators, when plaintiffs, exempted? Are they not "person or persons"? If the words "person or persons" do not comprise executors and administrators, *when plaintiffs*, why should the same words include executors and administrators defendants? Nor does the construction which would exempt executors and administrators plaintiffs from liability to costs, by the operation of the words "any specialty made *to the plaintiff or plaintiffs*, or upon any contract supposed to be made between the plaintiff or plaintiffs and any other person or persons," derive any sanction from the following words: "or upon any statute, for any offence or *wrong personal*, immediately supposed to be done to the plaintiff or plaintiffs:"—which, I should contend, is only cautious language, intended clearly to distinguish between "offences or wrongs" personal to the plaintiff or plaintiffs *individually*, and *public wrongs*, which would be the subject of *another* proceeding—an indictment; and in those cases it was *not* the intention of the legislature that the plaintiff or prosecutor should pay costs; and I think it further appears that such was the meaning of the legislature, from the expression immediately following, *viz.* "that the plaintiff or plaintiffs in *such kind* of action, &c. should pay costs," which must mean that *all* plaintiffs (whether executors or not,) in the particular kind of actions enumerated, should pay costs.

By the common law, we know the defendant had no means of recovering costs from the plaintiff, if the latter were nonsuit, or the former had a verdict. The statute of Hen. 8., therefore, for the *first* time, gave a remedy to defendants in such cases; but it was necessary clearly to distinguish between civil and criminal proceedings. To me it appears a weak argument indeed, to contend, that the executors or administrators of the plaintiff or plaintiffs are exempt, because the act, which *commences* by enacting "that if *any person or persons* shall bring any action, &c. and shall be nonsuited, or a verdict pass against them, they shall pay costs to the defendant," in the *subsequent* part substitutes for the expression "person or persons" the words "plaintiff or plaintiffs." The alteration of the expression is manifestly proper, and imparts a clearness to the language

which would have been wanting, had it been expressed "any person or persons" suing for a debt owing from, or upon any especialty made by or between "any *other* person or persons," such "person or persons" shall pay costs. According to the construction now put upon the statute, either *such* must have been its undistinguishing verbiage, to have included executors and administrators plaintiffs, or the executors and administrators must have been expressly named. But why should it be thought necessary, in order to bind a man's executors and administrators in an act of parliament, that they should be named, when, in a bond or covenant, they are bound without being named? —(Dyer 14, pl. 69)—particularly when common sense and common justice equally require that they ought to be bound in both cases.

The privilege in question is so palpably absurd and unreasonable, that it is truly astonishing our Judges could have tolerated it so long. According to it, a man may be sued for an alleged debt or a supposed wrong, and though he may establish beyond all doubt that he neither owes the one nor has committed the other, yet there is no law by which that man could call upon the person suing him to indemnify him from the "costs and charges so most wrongfully sustained." It is but poor compensation to a defendant in such circumstances to be told, instead of having his claim upon the plaintiff for costs, that the latter was merely an executor, and that he brought the action in ignorance of the facts. Executors are made acquainted with their immunity, and frequently bring actions, knowing that they hazard nothing personally, and often have nothing to lose in their representative character.

Surely, it is high time so glaring an anomaly should be corrected. Its continuance cannot be required for the protection of the executor's own property or person. Only let him discharge his representative duties honestly and according to law, and both are inviolable. But such is not the case with many unfortunate defendants: that the law is on their side, matters not. I will conclude with mentioning an instance.—An individual was sued by an executor on a promissory note, purporting to have been given by him to the testator. On ascertaining the nature of the demand, the executor was assured that the note was surreptitious; but as the executor would go on with the proceedings, a summons was taken out and heard before *Tindal*, C. J., at chambers, to shew cause why the proceedings should not be stayed, on the ground that the defendant's name had been forged to the note, and why the plaintiff should not pay the defendant's costs? His Lordship being satisfied as to the forgery, ordered the proceedings to be stayed; but observed that he could make no order as to costs, and the defendant must lose them, as the plaintiff was undoubtedly privileged.

Manchester. T. P.

SUPERIOR COURTS.

KING'S BENCH.—PRACTICE COURT.

DIVISION OF COUNTIES.—SPECIAL SESSIONS. —MANDAMUS.

Where an order for altering the arrangement of the parishes, townships, &c. of any county, for the convenience of holding special sessions, has been made under the 9 G. 4. c. 43, §§ 2 & 4, there is no appeal against it; §§ 8 & 9 of that act only applying to orders made under the authority of § 7.

Balguy and *N. Clarke* shewed cause against a rule obtained by *Clinton*, calling upon certain justices of Derbyshire to shew cause why a *mandamus* should not issue, commanding them to hear the petitions of several townships in the said county, who considered themselves aggrieved by the order of the said justices under 9 G. 4. c. 43. That act is entitled "An Act for the better regulation of Divisions in the several Counties of England and Wales." In the 1st section it provides, "That at any time or times after the Michaelmas quarter sessions next following the passing of this act, it shall be lawful for any two or more justices of the peace for any county, riding, or division, in England or Wales, having a separate commission of the peace, to transmit to the clerk of the peace a statement in writing, signed by such justices of the parishes, tithings, townships, and places within the same, which in the opinion of such justices would form together a convenient and proper division within the same county, and for which special sessions should thenceforward be held; or of any parishes, tithings, townships, or places, which in the opinion of such justices ought to be annexed, for the same purposes, to any other division in the said county than those or that of which, at the time of making such statement, they form a part; and that every such statement shall, among other things, set forth within what existing divisions or division, limits or limit, the several parishes, tithings, townships, and places enumerated in the same are situated or deemed to be, and also whether one or more, and what existing divisions or limits will be altered by such proposed new divisions, or by the change of any place or places from one division to another; and also the names of such justices of the peace as, at the date of such statement, are usually resident or acting as such within the boundaries of such proposed new division." By sec. 2, it is enacted, "That at the quarter sessions next following the receipt of every such statement, setting forth such particulars as are above enumerated, and not otherwise, the clerk of the peace shall, and he is hereby required to lay the same before such justices of the peace in such sessions assembled; and the justices of the peace for such county, riding, or division, having such separate commission of the peace, shall, and they are hereby required (except in the cases hereinafter provided for) to proceed at the quarter sessions

next following the laying of such statement before them as aforesaid, to the consideration thereof, and, at their discretion, to adopt the same wholly or in part, or to reject the same altogether, or to adjourn their determination thereupon to the next or any succeeding quarter sessions." The 3d sec. provides, "That immediately after the quarter sessions at which such statement shall have been first laid before the justices of the peace, the clerk of the peace shall cause to be published a copy of such statement in three successive numbers of one or more weekly newspapers usually published or circulated within the said county, riding, or division, and in which the advertisements of county business are usually inserted; and at the foot of such copy, shall also cause notice to be given that such statement has been laid before such justices in pursuance of the directions of this act, and that the same will be taken into consideration by the Court at the then next ensuing quarter sessions." By the 4th sec. it is enacted, "That when and so often as the justices of the peace of any such county, riding, or division, having a separate commission of the peace, shall adopt, wholly or in part, any such statement so laid before them, and shall determine to change any parish, tithing, township, or place, from one division to another, or to constitute, any new division within which special sessions shall thenceforward be holden, the said justices of the peace shall thereupon make an order for such alteration, or for the constituting and defining such new division, and in such last mentioned order shall particularly enumerate the several parishes, tithings, townships, and places to be comprised within such new division, and shall also specify the division or divisions within which respectively any parishes, tithings, townships, and places disannexed by such order from any former division, and not forming part of such new division, shall thenceforward be taken to be, and also shall affix to such new division the name of some principal and convenient parish, township, or place, within the same, and also shall, in either of such orders, as the case may be, particularly set down the day from which such order shall take effect; and the clerk of the peace for such county, riding, or division, shall forthwith publish a copy of such order in three successive numbers of one or more such weekly newspapers as aforesaid, and shall transmit a copy of such order to every high constable within the limits of such new or altered division or divisions." The two next sections are only supplemental to the four first. All these six sections clearly apply only to orders made by the sessions on the representation of two magistrates. By sec. 7, a much more extensive power is given to the sessions. The words of that section are—"That at the quarter sessions next after the laying of any such statement before the justices in such sessions assembled, it shall and may be lawful for such justices, if they shall deem it expedient and proper not to proceed to the single consideration of such statement, but instead thereof to cause to be made an enquiry and examination into the boundary lines, extent, and other local circumstances of all the existing and accustomed divisions for the holding of special sessions within the commission of such justices; and at such or any succeeding quarter sessions to which the conclusion of such enquiry and examination may from time to time be adjourned by order of sessions, to regulate, alter, new model, and subdivide, all or any of such divisions, in such manner as shall appear to them proper and convenient, particularly specifying in such order the names of all such divisions, whether newly constituted, altered, or unaltered, the several parishes, tithings, townships, and places to be comprised in each, and affixing or continuing to each the name of some principal and convenient parish, township, or place, within the same." The 8th sec. directs, "That the clerk of the peace for any county, riding, or division, in which such order shall have been made as last aforesaid, shall forthwith publish a copy of the same in three successive numbers of one or more such weekly newspapers as aforesaid, and shall also forthwith transmit by the post a copy of the same to the churchwardens and overseers of the poor of each parish within the said county, riding, or division, to be by them affixed on the principal door of the church of such parish; and at the foot of every such copy, so published or transmitted, shall add a notice specifying at what time such order will be enrolled, as hereinafter provided, and at what time and in what manner any person or persons, or body corporate, aggrieved by such order, may petition against the same or any part thereof, as hereinafter provided." The 9th sec. enacts, "That in every such order, some time (not earlier than the fourth quarter sessions next after the making thereof) shall be provisionally specified, on which the same shall be enrolled as hereinafter provided, subject to such alteration as may thereafter be made either in the particulars of the said order, or in the time of its enrolment, and that at any court of quarter sessions preceding such time, it shall and may be lawful for any one or more person or persons, or body corporate, jointly or severally, to present a petition in writing to such court against all or any part of such order, and to produce witnesses in support of such petition; and the justices in such court assembled shall, and they are hereby required to hear and determine, in a summary way, the merits of such petition, and to amend such order as far as may, upon such hearing, appear proper and convenient: Provided always, that no such petition shall be received or examined into, unless after due proof that a notice in writing, specifying the grounds thereof, which upon the hearing shall alone be enquired into, hath been served ten clear days before the commencement of such sessions, upon one of the overseers of the poor, or the tithingman, or constable, or two substantial housekeepers of the parish, tithing, township, or place respectively, as the case may be, wherein such petitioner or petitioners shall be resident at the time of presenting such

petition, and also lodged twenty clear days before such commencement at the office of the clerk of the peace, who shall, and he is hereby required forthwith to transmit a copy thereof to each of the justices usually acting within or for the district, or places or place named in such notice." By the 6th sec. the former order is to be in force for twenty-one years; and by the 10th sec. the latter order is to be in force for ten years. By the 10th sec. this latter order is to be enrolled after the sessions. In the present case, at a special sessions, held at Tideswell, of the justices acting for the hundred of High Peak, a statement of the places in the hundred which would, most conveniently to the inhabitants, form a new division, was prepared. The townships of Hathersage, Outseats, Bamford, and Derwent, were in the High Peak hundred, but by mistake not included in the statement. This statement was, according to the directions of the act, laid before the magistrates at the Easter sessions, and the regular notices given that the sessions would take the statement into consideration at the July sessions. It was taken into consideration and adopted, leaving the four above-mentioned townships in the same division as before; the consequence of which was, that the inhabitants of those townships still had the same distance to travel to the special sessions as before, instead of a much shorter distance, which they would have had if included in the new division. At the following January sessions, they accordingly presented a petition against this order. The magistrates conceiving they had no authority to receive it, refused to entertain it. The present application was therefore made to compel them so to do. It is clear the magistrates have no authority to interfere. The power to appeal is confined by the act to orders made under sec. 7. The orders under the previous sections of the act are final. It is evident the legislature contemplated two distinct orders. One is partial, on the representation of two magistrates, the other is general, and may extend to the dislocation of the whole county. Each order is to be attended with formalities different from the other. The first order may come into effect immediately; while the latter order cannot come into effect until a considerable time after the sessions which made it. The former order is to be published in the newspapers, without any notice to the inhabitants of the townships of the manner in which they may petition against it; but the latter order has such a notice. The former order is not to be enrolled, but the latter is. But on the language of sec. 9, the words "such order" clearly apply to the order mentioned in sec. 7; and to those orders the right of appeal is confined. The petitioners here are not aggrieved by the act, for if they choose they may appear at the sessions before the order is made, and point out in what way the modification proposed by the two magistrates will benefit or injure them. Having allowed that opportunity to pass without availing themselves of it, they are precluded now from opposing the order. But the words of sec. 8, only give a right of petitioning to those who are "aggrieved" by such order. Yet how can these petitioners contend that they are "aggrieved," since they are placed in no worse situation than they were previous to making the order.

Clinton and *Whitehurst, contrà.* Taking the act altogether, the intention of the legislature was, to make no distinction between orders under sections 2 & 4, or as under sec. 7. The *general* intention of the legislature is to be considered in the construction of statutes, and that is to be carried into effect, if possible. Now it is manifest that the general object of the legislature here was, that all persons who had cause to complain of or object to the new division, whether of a particular district or of the whole county, should have some opportunity of being heard. Therefore the words "*every* such order," in sec. 9, must be taken distributively, as applying to *every* order made under the act. It is said, the petitioners may appeal before the order is made; but they have no reason to appeal before then, because until then, they are not aggrieved; nor could they if they were, for there is no power of appealing in such cases given by the act: the only appeal clause is that in sec. 9. That the legislature intended that there should be an appeal in the present case is manifest, for otherwise this absurdity would follow.—It is admitted, that if this arrangement had been made for the general dislocation of the county, the petitioners would have a right to appeal. If that arrangement were a grievance, it would only last ten years; but the grievance arising from the present arrangement would last twenty-one years. Therefore, if parties are to be aggrieved by an order for ten years only, they are to have a right of appeal; but if they are to be aggrieved for twenty-one years, then they are to have no right of appeal. Again, before making the second order, the magistrates have great opportunity granted to them for consideration; and an appeal is given against an order after such consideration; but against an order made without such consideration, there is no appeal, although it should seem much more important to have an appeal against an order made without consideration, than a joint one made after consideration. And it must not be forgotten, that so far as regards the *amount* of inconvenience any particular place may sustain by the division, it is perfectly immaterial whether it is made under the division of a particular hundred, or the dislocation of the whole county. Why then should the right of appeal be confined to one only? It is manifest, therefore, on viewing the whole act together, that the general intention of the legislature was to give the right of appeal in both cases, and therefore that general intention ought not to be controlled by some doubtful expressions to the contrary; and a *mandamus* ought to go, commanding the justices to receive the petition.

Taunton, J.—I am of opinion, and my opinion is perplexed with no doubt, that this rule

ought to be discharged. The object of the legislature, as disclosed in the preamble, was to introduce better regulations with respect to the divisions of the several counties in England and Wales, for the purposes of special sessions. The 1st sec. empowers two or more justices of the peace to send a statement of what they consider the most convenient arrangement with respect to the townships, parishes, &c. for the purpose of holding special sessions, to the clerk of the peace for the county. This statement, by sec. 2, is to be laid before the justices at the next sessions after the receipt of it, and at the following sessions the justices are to take it into consideration, and adopt or reject it, wholly or in part, according to their discretion. By sec. 3, after the quarter sessions at which such statement has been laid before the justices, it is to be published in the county newspapers, with a statement that it will be taken into consideration at the ensuing quarter sessions. By sec. 4, the justices are to make an order, founded on the adoption, whether partial or entire, of the statement made by the magistrates, and in that order state the day when it shall take effect. By sec. 6, the order so made is to be in force for twenty-one years. The object of granting the time between the sessions at which the statement of the magistrates was laid before the sessions, and the subsequent sessions at which it is to be taken into consideration, and also of the advertisements of the statement, must necessarily be supposed to have been to give to all parties, who felt themselves interested, an opportunity of appearing at the sessions and opposing or supporting what was to be done. All these sections relate to orders to be made on the statement received by the clerk of the peace from the magistrates: all persons having an opportunity of coming and complaining of what was to be done, or suggesting improvements. Then comes sec. 7, and it is said that the order contemplated by that section is the same as the order to which the previous sections relate. But it is utterly impossible that they can be considered as one and the same order. Under the former sections the quarter sessions had only power to adopt or reject the statement transmitted to them; but under the 7th sec. it has power to alter the whole arrangements of the county as to special sessions. For this purpose they must be considered as possessing an original jurisdiction. The words of sec. 8, "That the clerk of the peace for any county, riding, or division, in which such order shall have been made as last aforesaid," clearly refer to the order made under the authority of sec. 7, and not to an order made under the former sections. Under sec. 8, the clerk of the peace is to transmit "by the post" a copy of the order to the churchwardens and overseers of the poor of each parish within the said county, riding, or division, to be by them affixed on the principal door of the church of such parish;" but the order, under the former sections, is only to be transmitted "to every high constable within the limits of such new or altered division or divisions." By sec. 8, a notice is to be placed at the foot of every such copy so published or transmitted, specifying at what time such order will be enrolled, and at what time and in what manner any person aggrieved by such order may petition against the same;" which is not the case with respect to the former order. The latter order is to be enrolled, but the former order is not. Sect. 9, gives a direct power to persons to petition against the latter order; but no such power is given against the former order. The latter order is to be binding, by sec. 10, for ten years; but the former order is binding for twenty-one years. Nothing can shew clearer that these are separate and distinct orders, than prescribing two different periods for the operation of them. The one, which is of a limited operation, is to continue twenty-one years in force; the latter, which is of extensive operation, is only to remain ten years in force. For these reasons, it appears to me, that sec. 9, which gives a power of petitioning, only gives it against an order under sec. 7, which is adverted to in sec. 8. This being admitted to be an order under the former sections, the justices were right in refusing to hear this petition.

Rule discharged.—*Rex* v. *The Justices of Derbyshire*, May 8th, 1831. K. B. P. C.

INDORSEMENT OF DEBT AND COSTS.

The Court will not set aside process on account of the amount of debt and costs not being endorsed upon it, according to R. 2, Reg. Gen. H. T. 2 W 4, unless it appears on affidavit that the cause of action was a debt.

Thomas applied for a rule *nisi* to set aside process, on the ground that the amount of debt and costs demanded by the plaintiff was not indorsed on the writ, according to 2 Reg. Gen. H. T. 2 W. 4. He acknowledged, that he was not prepared with an affidavit to shew what the cause of action was.

Patteson, J.—You ought to have an affidavit, stating that the cause of action is a debt; for if not, the rule does not apply.

Rule refused.—*Curwin* v. *Moseley*, June 7th, 1832. K. B. P. C.

NOTES OF THE WEEK.

REGISTERING BARRISTERS UNDER THE REFORM ACT.

We were enabled on the 25th of August to give the List of Appointments for the Oxford, Norfolk, North and South Wales, and Western Circuits. We now present the Midland and Home.

Midland Circuit.

Lincolnshire.

Parts of Lindsey	Mr. Waddington & Mr. Harwood.
Parts of Kesteven and Holland	Mr. N. Clarke and Mr. Wildham.

Nottinghamshire.

North Division	Mr. Moylan and Mr. Burnsley.
South Division	Mr. Fisher and Mr. Alexander.

Derbyshire.

North Division	Mr. S. Williams and Mr. Marriott.
South Division	Mr. Miller and Mr. P. Elliott.

Leicestershire.

North Division	Mr. Flood and Mr. Solto.
South Division	The Hon. Mr. Curzon & Mr. Finnelly.

Rutlandshire - - Mr. Parker.

Warwickshire.

North Division	M. A. Park and Mr. Dickens.
South Division	Mr. Malpas and Mr. Bourne.
Birmingham Town	Mr. Amos and Mr. Hildyard.

Northamptonshire.

North Division	Mr. Basevi and Mr. Greasley.
South Division	Mr. Humfrey & Mr. Chamberleyne.

Home Circuit.

Mr. Knox,	Mr. Chambers,
Mr. Long,	Mr. Lennard,
Mr. Baker,	Mr. Moore,
Mr. Ryland,	Mr. Peake,
Mr. Capron,	Mr. Gurney,
Mr. Reynolds,	Mr. M'Clean,
Mr. Bosanquet,	Mr. Deedes,
Mr. Espinesse,	Mr. Onslow,
Mr. Round,	Mr. Brett.
Mr. Richmond,	Mr. Brockman, for
Mr. Bullock,	the Boroughs in
Mr. Knapp,	Kent.

NEW BUILDING FOR PUBLIC RECORDS.

It was well observed by Mr. Freshfield, on presenting the petition for new chambers for the Judges, that the suggestion recently made in the House of Commons, of providing in the same buildings for a *national gallery*, and the preservation of the *public records*, "would be equally remarkable for its incongruity and its inconvenience. The two objects (he said) had no natural connexion with each other, and the *locality* which would be well chosen for the one, would involve practical difficulties with reference to the other, and would present an instance of bad taste which, especially in a national work, ought to be avoided. He, therefore, urged upon government the propriety of providing for the due keeping of the public records in the same building, in which, he trusted, the judges of the land would be suitably accommodated for the discharge of their important duties."

A building for the records having been resolved upon as indipensable for their preservation, we trust the more appropriate union with the administration of justice, as recommended by Mr. Freshfield, will be adopted. The site of Charing-cross may be very proper for the national gallery, but would be exceedingly inconvenient for those who require extracts from the Records. For the latter object, the vicinity of the inns of Court is undeniably the best adapted, and the Rolls property, both for this purpose and for judge's chambers and law offices, would be peculiarly suitable. We trust that the press, generally, will advocate so obvious an improvement.

ANSWERS TO QUERIES.

COMMON LAW.

BANKRUPTCY.—ACTION. P. 271.

By sec. 22. of 1 & 2 W. 4. c. 56, it is enacted, (speaking of official assignees,) that "one of which said official assignees shall in all cases be an assignee of each bankrupt's estate and effects, together with the assignee or assignees chosen by the creditors." There can be therefore no doubt that the action should be brought in the name of *both* assignees. J.

USURY. P. 271.

I think the averment in the declaration good, provided the note was paid *on demand*. *B.* was no party to the dealing between *A.* and the country banker. *A.* took the note for 200*l.*, and (assuming it was good) had he himself presented it, or sent it by his clerk or servant, it would have been paid *without any deduction*; but, for his own accommodation,

and after he has completed his contract with *B.*, he took this note, which he had accepted as part of the money he was to receive, and for which he might have obtained the full amount, had he presented it at the London agents; then he sold it to a *third party*, without *A.'s* knowledge or consent, for one-fourth less than its value. Suppose he had sold it to the country banker for 100*l*; that *alone* would not have convicted *B.*, who was no party to the sale, of usury. It seems to me, that the averment is sufficiently certain, if the note was paid in full, and that the action can be maintained

J.

APPOINTMENT OF COMMON LAW JUDGES. P. 287.

The Lord Chief Justices of the King's Bench and Common Pleas are appointed by writ: the puisne Judges and Barons of the Exchequer, by letters patent. See Tidd. 7th ed. 37.

J.

PRACTICE.—JUDGMENT.—EJECTMENT. P. 287.

It is *not* necessary to enter an appearance. See Impey's K. B. 10 ed. 579; and Chitty's New Practice, 221. The rule of M. 33 Car. 2, states "common bail only."

J.

FATHER'S LIABILITY.—MINOR. P. 288.

Cases of this kind generally depend on the peculiar circumstances attaching to each; for although it is a principle of law that a parent is bound to support his offspring, still that rule is modified, and he is not bound to support them if they are able to work: the wife's agreement is, of course, void by coverture. In this case, the father does not seem to have taken any care of his child, or to have put him in the way of getting his own living. I should therefore think, that (notwithstanding the allowance made by him, which, it appears, is but a trifle) the father is liable, and that he is the party to be sued. See 1 Black. Com. 447-8.

J.

REFORM ACT.—JOINT OCCUPIER. PP. 271 and 287.

With deference to the opinion of your contributor W. T., in his answer to M. P.'s question, I think he is in error with regard to *B.'s* capability to vote; and I differ with him on the following grounds: 1st, That the occupation is neither "*a house or other building*, which, either separately or jointly with any land within the same city or borough, is of the clear yearly value of 10*l*." (sec. 28.), but *apartments* held under the *tenant*, and therefore in the nature of a *sub-lease*; and sub-lessees, and assignees of any underlease, are expressly disqualified (sec. 20). 2d, That to constitute a dwelling, and in order to qualify as a householder, it is necessary that the voter should have *the controul of the outer door* (2 Peck. 244); and, 3d, That the rates and taxes are not paid in respect of such occupation, but by the *tenant* for the whole.

ASPIRO.

LAW OF PROPERTY AND CONVEYANCING.

TRUSTEES.—LEASE.—ASSIGNMENT. P. 271

I do not think the case put by C. M. W. comes within Lord Coke's rule, that a man cannot hold a term in his own right, and a freehold in *autre droit*, inasmuch as *C.*, although *sole* tenant of the term, was not *sole* tenant of the fee. See *Wiscot's case*, 2 Rep. 60, (referred to in 2 Preston on Abstracts, 13,) where a joint tenancy was held to prevent the merger of a particular estate, which subsisted in *one* of the joint tenants. I therefore think the term does *not* merge. Doubtless *D.* is liable to the trustees for breaches of the covenants contained in the demise; (see Woodfall, 267; Doug. 460); and even if the term had merged, would have continued liable up to the time of the merger.

J.

WILL.—MONEY IN THE FUNDS. P. 288.

The will is clearly inoperative, as to the money in the funds, which latter is, by 33 G. 3. c. 28, and 35 G. 3. c. 14, made devisable, *provided* the instrument be attested by *two or more* credible witnesses. The money in the funds must therefore be distributed equally between the brother and sisters.

J.

[We have just received two other opinions, directly contrary to this. ED.]

VOLUNTARY SETTLEMENT.—CREDITORS. P. 288.

1. It is clear, by the tenor of all the bankrupt laws, and finally by 6 G. 4. c. 16. § 73, that a *solvent* trader may make any disposition of his property *to bind his creditors*. The settlement by *A.* therefore is valid. See Archbold's B. L. 3d ed. 155, where several cases are collected on the subject. This case undoubtedly comes within the exception of sec. 73, as applying to children.

J.

2. In this case, the voluntary conveyance by *A.* will be *good*, in favor of his wife and children, and against his creditors, if no *intent to defraud* his creditors can be imputed to him. *Stileman* v. *Ashdown*, 2 Atk. 481. *Doe* v. *Routledge*, Cowp. 711. The length of time which elapsed between the date of the settlement and the bankruptcy, raises a strong presumption that the settlor was, when he executed the former, in solvent circumstances, and that the conveyance was not made *in contemplation of bankruptcy*. The following *dictum* of Lord Hardwicke seems precisely in point: "If," he says, "there be a voluntary conveyance of real estate or chattel interest by one *not indebted at the time*, though he afterwards becomes indebted, and that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive subsequent creditors, that will be good; but if any mark of fraud, or intent to deceive subsequent creditors appear, that will make it void." *Townsend* v. *Wyndham*, 2 Ves. 11. And see also Fonblanque on Equity, 4th ed. 271-2, n. (a).

H.

QUERIES.

LAW OF PROPERTY AND CONVEYANCING.

DEVISE.—ANNUITY.

Devise of hereditaments to *A. B.* in fee, on condition that he should pay testator's daughter *D.* during her life, an annuity of 34*l.*: and testator charged the hereditaments so devised with the payment of 700*l.*, which he gave to such *issue* of his daughter *D.* as should be living at her decease, and should have then attained, or should afterwards attain, the age of twenty-one years; if more than one *child*, equally, share and share alike, and if but one *child*, then wholly to such *child*; and if any *issue* of his daughter should be under age at her decease, then that the said *A. B.* should apply the interest of the share or shares which such minor *child* or *children* might become entitled to by virtue of his will, in or towards his, her, or their maintenance and education. *D.* is still living, and has issue, one son and a granddaughter, the daughter of a deceased child. 1. What interest does *D.'s* son take in the 700*l.*? 2. What interest, if any, does the granddaughter take in it? J. W.

COMMON LAW.

PUBLIC BRIDGES.

By stat. 43 G. 3. c. 59. § 5. it is enacted, that no bridge thereafter to be erected at the expense of any individual, &c. should be repaired at the expense of the county, unless erected under the direction of the county surveyor, &c. About a year after the passing of the above act (*viz.* in 1804), the trustees of a turnpike road erected a bridge in the township of *B.*, for the better accommodation and advantage of the public, there being no bridge before that time; but the same was *not* built under the direction of the county surveyor, or person appointed by justices of the peace, at their quarter sessions assembled. The expense of building it, amounting to 700*l.*, was defrayed out of the funds arising from the tolls taken on the road. The local turnpike act contains no provision authorizing the trustees to build any bridges, nor are they bound to repair any. There is no clause inserted in the above act by which it can be ascertained who are hereafter liable to repair the bridges. The bridge being in want of repair, who is liable to repair the same, the county, the township in which the bridge is, or the trustees under the local turnpike act? K.

PRACTICE.

ENGLISH NOTICE ON NEW PROCESS.

I am far from satisfied with A. X.'s reply to my query. I had myself pointed out that the new process is analogous to the English notice formerly used. A. X. does not assert that the statutes 12 G. 1. c. 29, 5 G. 2. c. 27, and 21 G. 2. c. 3, which require the English notice upon the copy of process, have been repealed; if not, the Court, I conceive, cannot decide that the notice need not be on the copy process; for no judge-made law (as Bentham terms it) has, as yet, amounted to repealing an express act of parliament; neither, I conceive, can they logically decide that the copy of process is at the same time both a copy process and a notice written *upon* itself. The question is important, as upon it will depend, probably, the validity of the service of most of the new processes issued next term; and till some better reason is given than A. X. has given, in his answer in p. 256, to my query in p. 240, I must believe the English notice, however tautologous, will be necessary. T. T.

MISCELLANEA.

LORD THURLOW'S EARLY SCHOLARSHIP.

Lord Thurlow's superiority of abilities was discovered very early, both at school and college. They extorted submission from his equals, and impressed his seniors with awe. The following anecdote is told of him.—Having been absent from chapel, or committed some other offence, which came under the cognisance of the dean of the college, the dean, who, though a man of wit, was not remarkable for his learning, set Thurlow, as a punishment, a paper in the Spectator to translate into Greek. This he performed extremely well, and in very little time; but, instead of carrying it up to the dean, as he ought to have done, he carried it to the tutor, who was a good scholar, and a very respectable character. At this the dean was exceedingly wroth, and complained to the fellows of the insult, and insisted that Mr. Thurlow should be convened before the master and fellows, and receive a severe reprimand. They were convened accordingly, and the master of the college accused him of the insult; to which Thurlow coolly replied, "that what he had done proceeded, not from disrespect to the dean, but merely from motives of pity, an unwillingness to puzzle him." The irritated dean ordered him immediately out of the room, and then insisted that the master and fellows ought immediately to expel or rusticate him. This request was nearly complied with, when two of the fellows, wiser than the rest, observed, that expelling or rusticating a young man for such an offence, would perhaps do much injury to the college, and expose it to ridicule; and that as he would soon quit the college of his own accord, to attend the Temple, it would be better to let the matter rest, than irritate him by such severe measures; which advice was at length adopted. One of the gentlemen who recommended lenient measures, was the present master, for whom Lord Thurlow procured the Chancellorship of the diocese of Lincoln.

The Legal Observer.

VOL. IV. SATURDAY, SEPTEMBER 15, 1832. No. C.

> ——— "Quod magis ad NOS
> Pertinet, et nescire malum est, agitamus."
> HORAT.

LEGAL BIOGRAPHY.

No. II.

SIR JAMES MACKINTOSH.

SEVERAL sketches of the life, and some account of the writings, of Sir James Mackintosh, have appeared, composed with different degrees of ability, but all designed chiefly to interest the general reader. We purpose to address ourselves to the legal profession in particular, and besides giving a brief outline of the principal events of his life, to notice somewhat fully his legal writings, and such of his legislatorial exertions as related to improvements in the law.

He was born in Morayshire, in Scotland, on the 24th October, 1765. He was descended from an old Scottish clan, and his immediate ancestor was a British officer. His education (speaking of it in a limited sense) was commenced at Fortrose, and completed at King's College, Aberdeen; but in its largest signication, it continued till his death. He was constantly accumulating new stores of knowledge, and exercising his powerful faculties to the last.

He was distinguished at Aberdeen for his proficiency in Greek and Mathematics—an evident indication in early life of the bias of his mind towards those pursuits which led him to literary eminence, and the display of those powers of reasoning for which he was afterwards celebrated. Thus we have another example of the early "bent of genius;" and happily, in his case, he was enabled at first to enter the path which soon conducted him to eminence.

In 1787, when he had attained his twenty-second year, he proceeded to Edinburgh, where he studied medicine, attended the lectures of Dr. Cullen and Professor Black, and took a degree at the University. It is observable, that he became acquainted at that early period with men of the first eminence and rank. Amongst these were Adam Smith, and the Earl of Buchan, the brother of Lord Erskine. He was not content with the society of inferior minds, but advanced to intellectual communion with those whose high attainments he was ere long destined to equal[a].

In 1788, we have the first notice of him in London, where he wrote a pamphlet on the Regency question, which, for our present purpose, we are not interested in particularly considering. About this time, he became a student of one of the Inns of Court. There was nothing, however, in the habits or pursuits of these "legal colleges" to satisfy his thirst for information; and, after some short time, he proceeded to the continent, visiting its principal cities, and continuing some time at Leyden and Leige.

At the commencement of the French Revolution he returned to England, and in the

[a] He was one of the annual presidents of the Royal Medical Society with Dr. Haslam; but preferred the speculative society for public speaking, of which he was a distinguished member.

year 1791, wrote his *Vindiciæ Gallicæ*, in answer to Burke's Reflections on the French Revolution [b]. This was applauded by the partisans of the new school, as a work superior in the charms of composition to its redoubted rival. In acuteness, depth, and soundness of reasoning, of course, there was supposed to be no comparison. Burke's "Regicide Peace," published some years after this period, was reviewed by Mr. Mackintosh in the Monthly Review, doing justice to the author and the style—combating the inferences, but with a candour amounting to deference. This was gratifying to Mr. Burke, who had hitherto been grossly abused by the opposite party, and he sent an invitation to the reviewer. Three days' animated discussion, it is said, took place; and Mr. Mackintosh became a convert to the political views of the author of "The Sublime and Beautiful." This conversion, by a man of kindred genius, was proved by the sentiments which pervaded the celebrated lectures of Mr. Mackintosh, delivered in Lincoln's Inn Hall.

In the year 1795, he was called to the bar; and in 1798, these lectures were commenced—the subject being "The Law of Nature and Nations." At this time, he had reached the age of 33; but it does not appear, that he had succeeded in attaining any considerable share of practice. The introductory remarks in his first discourse obviously shew the truth of this remark. He observes, that he had always been unwilling to waste, "in unprofitable inactivity," that leisure which the first years of professional life usually allow, and which diligent men, even with moderate talents, may often employ in a manner neither discreditable to themselves nor wholly useless to others.

The plan of his lectures, at the particular juncture of public affairs, was attractive, and indicated the extent of his ambition. He says, "I had long been convinced that public lectures, which have been used in most ages and countries to teach the elements of almost every part of learning, were the most convenient mode in which those elements could be taught; that they were the best adapted for the important purposes of awakening the attention of the student, of abridging his labours, of guiding his enquiries, of relieving the tediousness of private study, and of impressing on his recollection the principles of science. I saw no reason why the law of England should be less adapted to this mode of instruction, or less likely to benefit by it than any other part of knowledge [c]."

The taste which now prevails for lectures on jurisprudence, induces us, particularly at this season of the year, when other subjects of interest are suspended, to enter more at large than we should otherwise venture, on the consideration of the merits of the celebrated "Discourse on the Study of the Law of Nature and Nations."

In reviewing the works which existed on this subject, the lecturer devoted a large share of his attention to *Grotius*. The following is an interesting testimonial to the learning of that distinguished writer:

"He combined the discharge of the most important duties of active and public life with the attainment of that exact and various learning which is generally the portion only of the recluse student. He was distinguished as an advocate and a magistrate, and he composed the most valuable works on the law of his own country; he was almost equally celebrated as an historian, a scholar, a poet, and a divine; a disinterested statesman, a philosophical lawyer, a patriot who united moderation with firmness, and a theologian who was taught candour by his learning. Unmerited exile did not damp his patriotism; the bitterness of controversy did not extinguish his charity. The sagacity of his numerous and fierce adversaries could not discover a blot on his character; and in the midst of all the hard trials and galling provocations of a turbulent political life, he never once deserted his friends when they were unfortunate, nor insulted his enemies when they were weak. In times of the most furious civil and religious faction, he preserved his name unspotted, and he knew how to reconcile fidelity to his own party, with moderation towards his opponents. Such was the man who was destined to give a new form to the law of nations, or rather to create a science, of which only rude sketches and indigested materials were scattered over the writings of those who had gone before him. By tracing the laws of his country to their principles, he was led to the contemplation of the law of nature, which he justly considered as the parent of all municipal law."

The following were the views of Mr. Mackintosh of the general principles of civil and criminal laws, as explained in this discourse:

"The first principles of jurisprudence are simple maxims of reason, of which the observance is immediately discovered by experience to be essential to the security of men's

[b] This work procured him the friendship of the Duke of Bedford, of Fox, Grey, Sheridan, and Whitbread.

[c] Discourse on the Study of the Law of Nature and Nations.

rights, and which pervade the laws of all countries. An account of the gradual application of these original principles, first, to more simple, and afterwards to more complicated cases, forms both the history and the theory of law. Such an historical account of the progress of men, in reducing justice to an applicable and practical system, will enable us to trace that chain, in which so many breaks and interruptions are perceived by superficial observers, but which in truth inseparably, though with many dark and hidden windings, links together the security of life and property with the most minute and apparently frivolous formalities of legal proceeding. We shall perceive that no human foresight is sufficient to establish such a system at once, and that, if it were so established, the occurrence of unforeseen cases would shortly altogether change it; that there is but one way of forming a civil code, either consistent with common sense, or that has ever been practised in any country, namely, that of gradually building up the law in proportion as the facts arise which it is to regulate. We shall learn to appreciate the merit of vulgar objections against the subtlety and complexity of laws. We shall estimate the good sense and the gratitude of those who reproach lawyers for employing all the powers of their mind to discover subtle distinctions for the prevention of injustice;* and we shall at once perceive that laws ought to be neither more *simple* nor more *complex* than the state of society which they are to govern, but that they ought exactly to correspond to it. Of the two faults, however, the excess of simplicity would certainly be the greatest; for laws, more complex than are necessary, would only produce embarrassment; whereas laws more simple than the affairs which they regulate would occasion a defect of justice. More understanding† has perhaps been in this manner exerted to fix the rules of life than in any other science; and it is certainly the most honourable occupation of the understanding, because it is the most immediately subservient to general safety and comfort. There is not, in my opinion, in the whole compass of human affairs, so noble a spectacle as that which is displayed in the progress of jurisprudence; where we may contemplate the cautious and unwearied exertions of a succession of wise men through a long course of ages; withdrawing every case as it arises from the dangerous power of discretion, and subjecting it to inflexible rules; extending the dominion of justice and reason, and gradually contracting, within the narrowest possible limits, the domain of brutal force and of arbitrary will.

"I shall exemplify the progress of law, and illustrate those principles of universal justice on which it is founded, by a comparative review of the two greatest civil codes that have been hitherto formed—those of Rome and of England;* of their agreements and disagreements, both in general provisions and in some of the most important parts of their minute practice. In this part of the course, which I mean to pursue with such detail as to give a view of both codes, that may perhaps be sufficient for the purposes of the general student, I hope to convince him that the laws of civilized nations, particularly those of his own, are a subject most worthy of scientific curiosity; that principle and system run through them even to the minutest particular, as really, though not so apparently, as in other sciences, and applied to purposes more important than in any other science. Will it be presumptuous to express a hope, that such an inquiry may not be altogether an useless introduction to that larger and more detailed study of the law of England, which is the duty of those who are to profess and practise that law?

"In considering the important subject of criminal law, it will be my duty to found, on a regard to the general safety, the right of the magistrate to inflict punishments, even the most severe, if that safety cannot be effectually protected by the example of inferior punishments. It will be a more agreeable part of my office to explain the temperaments which Wisdom, as well as Humanity, prescribes in the exercise of that harsh right, unfortunately so essential to the preservation of human society. I shall collate the penal codes of different nations, and gather together the most accurate statement of the result of experience with respect to the efficacy of lenient and severe punishments; and I shall endeavour to ascertain the principles on which must be founded both the proportion and the appropriation of penalties to crimes.

"As to the *law of criminal proceeding*, my labour will be very easy; for on that subject an English lawyer, if he were to delineate the model of perfection, would find that, with few exceptions, he had transcribed the institutions of his own country."

We are induced to avail ourselves of the

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* The casuistical subtleties are not perhaps greater than the subtleties of lawyers; *but the latter are innocent, and even necessary.*—HUME'S *Essays*, vol. ii. p. 558.

† "Law," said Dr. Jonnson, "is the science in which the greatest powers of understanding are applied to the greatest number of facts." Nobody, who is acquainted with the variety and multiplicity of the subjects of jurisprudence, and with the prodigious powers of discrimination employed upon them, can doubt the truth of this observation.

* "On the intimate connexion of these two codes, let us hear the words of Lord Holt, whose name never can be pronounced without veneration, as long as wisdom and integrity are revered among men:—'Inasmuch *as the laws of all nations are doubtless raised out of the ruins of the civil law*, as all governments are sprung out of the ruins of the Roman empire, it must be owned *that the principles of our law are borrowed from the civil law*, and therefore grounded upon the same reason in many things.'—12 Mod. 482."

spirited criticism of one of the auditors of these lectures, which, we think, cannot fail to be generally interesting. It appears that, except the introductory discourse, no part of the lectures have yet appeared in print.

"There was a greater degree of power, or of dashing and splendid effect, in the lectures than was afterwards observable in the parliamentary orations of Mr. Mackintosh. He shewed greater confidence, and was more at home. The effect was more electrical and instantaneous; and this elicited a prouder display of intellectual riches, and a more animated and imposing delivery. Dazzling others by the brilliancy of his acquirements; dazzled himself by the admiration they excited, he lost fear as well as prudence; dared every thing; carried every thing before him. The modern philosophy,—counterscarp, outworks, citadel, and all,—fell by 'the whiff and wind of his fell *doctrine*,' as if it had been a pack of cards. The volcano of the French revolution was seen expiring in its own flames, like a bon-fire made of straw. He laid about him like one inspired. As to the visionary sceptics and Utopian philosophers, they stood no chance with our lecturer. Poor Godwin, who had come, in the *bon hommie* and candour of his nature, to hear what new light had broken in upon his old friend, was obliged to quit the field, after an exulting taunt thrown out at such 'fanciful chimeras, as a golden mountain and a perfect man.' Those who attended day after day, and were accustomed to have all their previous notions confounded and struck out by some metaphysical legerdemain, were at last at some loss to know whether two and two made four, till they had the lecturer's opinion on that head. He might have some mental reservation on the subject; some pointed ridicule to pour upon the common supposition; some learned authority to quote against it. One thing only appeared certain, that whatever opinion he choose to take up, he was able to make good, either by the foils or the cudgels, by gross banter or nice distinctions, by a well-timed mixture of paradox and common place, by an appeal to vulgar prejudices or startling scepticism. He drew largely on the learning of antiquity, on modern literature, on history, poetry, and the belles-lettres, on the schoolmen, and on writers of novels, French, English, and Italian. He had an antidote for every error, an answer to every folly. The writings of Burke, Hume, Berkeley, Paley, Bacon, Jeremy Taylor, Grotius, Puffendorf, Cicero, Aristotle, Tacitus, Livy, Tully, Machiavel, Guicciardini, Thuanus, lay open beside him, and he could instantly lay his hand upon the passages, and quote them, chapter and verse, to the clearing up of all difficulties, and the silencing of all oppugners."[d]

[*To be Continued.*]

[d] Hazlitts' Spirit of the Age; or Contemporary Portraits.

THE PROPERTY LAWYER.

No. IV.

ON THE RIGHT OF A CLERGYMAN TO CHARGE HIS BENEFICE.

We stated the law on this subject in our second volume, p. 193. We now add a case just reported on the point, in which it was held, that if a warrant of attorney expressly recites that the annuity is given as a collateral security for the payment of an annuity charged on a benefice, it will be void.

The defendant, Butts, who was rector of the parish church of Glewsford, in the county of Suffolk, and *A. B.* his surety, on the 12th of February, 1820, executed a warrant of attorney to confess judgment for 3000*l.*, reciting *that by an indenture of the same date, Butts, for a pecuniary consideration, had granted to the plaintiff, for a term of years determinable upon lives, an annuity of* 300*l.*, *charged upon and secured by a demise of the rectory*, and it was thereby declared that the plaintiff should hold the judgment upon trust to secure the said annuity, but that no execution should be issued unless the annuity should be in arrear for fourteen days, and that if and as often as one years annuity should be in arrear, and not paid for fourteen days after demand made thereof by notice, &c., then execution might be issued against the defendant Butts and his estate for 3000*l.*, and the sum or sums to be levied should be applied in payment of the arrears of the annuity and costs, and the surplus should be held upon trust to be laid out in the name of the plaintiff in the purchase of three per cent. consolidated annuities, upon trust to pay the said annuity as it should become due, and subject thereto, upon trust for the defendant Butts; and that the other defendant and his estate should still be liable for the arrears of the annuity, but no execution should be levied against him or his estate, except for the arrears of the annuity from time to time. Judgment was accordingly entered up; and in the year 1823, a year's annuity being in arrear more than fourteen days after demand made, a sequestration issued, under which the tithes and property of the living were taken by the sequestrator, to an amount greatly exceeding the arrears of this annuity due at the time of the execution. A rule *nisi* had been obtained for setting aside the warrant of attorney, judgment, and execution, as being void by the stat. 13 Eliz. c. 20.

Gurney, *F. Pollock*, and *W. Lee*, shewed cause, and relied upon *Monys* v. *Leake*, 8 T. R. 411, as shewing that the warrant of attorney was not void; and they distinguished the present case from *Flight* v. *Salter*, 1 B. & Ad. 675, in which the sequestration was to be obtained before the annuity became payable. Here it

was to be a consequence of the non-payment at the appointed time.

Erskine and *Manning* supported the rule.

In the same term Lord *Tenterden*, C. J., delivered the judgment of the Court. His Lordship, after stating the facts of the case, proceeded as follows:—We are of opinion that the warrant of attorney and judgment ought not to be set aside, but the execution only. The effect of the provision whereby execution, when a year's annuity shall be in arrear fourteen days after demand made, is to issue for 3000*l.*, &c. is to make the warrant of attorney an absolute charge on the benefice for the entire sum of 3000*l.*, and to give a power (if it were available by law) to take the profits of the living until the whole sum should be levied, and to apply the dividends, as far as they might go, in payment of it. We are of opinion that by law such a power cannot be allowed. That being so, and all the arrears of the annuity, due at the time of the execution issued, having long since been satisfied, so much of the rule as prays that the execution may be set aside, must be made absolute, and the rest discharged. *Kirlew* v. *Butts*, 2 B. & Ad. 736, n.

REVIEW.

A complete Series of the Law Reports in all the Courts, from the earliest Records of the Common Law. In Monthly Parts. Richard Pheney.

We find on our table the first part of this publication, and proceed to afford it a brief notice. Law Reports, except for the purpose of noticing some important or questionable decision, are not very susceptible of useful criticism; and, of course any analysis of their contents is out of the question. We are bound, however, on the present occasion, to hail this cheap edition of the old Reports. We claim some merit in having commenced the practice of supplying the profession with good law at a moderate price, and it seems likely to be followed. Here we are presented with 280 pages, royal octavo, closely printed, with numerous annotations, for six shillings. Two parts are to form a volume, or three, where they complete an entire work. The plan of the undertaking is very *promising*:

"Each Reporter will be printed *verbatim*, from the best editions, corrected; and each case collated with any contempory reports of the same case, in print or in manuscript, in public and in private collections.—The Chancery Reports will be corrected by the Register's books.—Material variances will be pointed out, with references to the most perfect report of each case.—New or revised marginal notes will be affixed throughout.—To be brought out in a handsome and uniform scale, at about *one-sixth* of the cost of the current Reports, by means of compressing the letter-press alone.—Translations will be given of such of the Reports as have not hitherto been rendered into English; and the whole of this body of learning and research will be arranged more perfectly than has hitherto been attempted, or would be practicable on a more limited scale of publication. The series will also be rendered unchangeably permanent, by confining the notes in the body of the work to the mere authentication of the decisions; and separating from it, by resorting to the Index for this secondary purpose, the portion that refers to the later authorities—a description of notes, that, however sanctioned by custom, have no necessary connexion with the imperishable authorities to which they have been so inconsiderately appended; while they are the sole occasion of the expense of frequent editions, to which they inevitably lead.—By thus separating the two dissimilar classes of note, the Index, which will be entirely reconstructed, and prepared with great care from the Report itself, will exhibit a clear outline of the principle determined by the case, with concise incorporated notes, set up in a smaller type, referring to the intervening authorities, both judicial and legislative, to the date of publication;—thus shewing at a glance, in a neat and simple form, the law laid down in the text, contradistinguished from any alterations it may have undergone in the interval; and this being the only part of the notes that can admit of renovation, it will be easy to supply the usual advantages of new editions as frequently as they may be wanted, without disturbing the text, by a publication of new Indices, at distant intervals, for such of the subscribers as may desire either to substitute them for their former ones, or to correct by them:—and by this simple mode, the present edition may be perpetuated."

Of the Index, which thus also professes to be of a superior and extensive character, we are unable to form an opinion, as we are in possession only of the first half volume. The specimen before us appears entitled to encouragement; but we shall be able to form a more decisive opinion upon seeing a continuation of the work. We hope, however, that due respect will be paid to existing copyrights. We observe that the intention is to "sail near the wind" in this respect; for the subscribers are expected to pledge themselves to take the work down to the year 1800—within a very short time of the statutory limit of protection.

In carrying the plan into effect, some delay has occurred in collating the cases with the contemporary Reports, and the researches into the Register's books. We trust that this part of the plan will be followed with scrupulous care. The labour

will be great, but nothing short of its faithful performance will satisfy the profession, or insure the success of the work. The undertaking is a large and important one, and, if well executed, we wish it success.

The present part comprises more than half of the 1st volume of Lord Raymond's Reports. It has been edited by Charles James Gale, Esq. Barrister at Law.

We have referred to the old edition in numerous instances, where the cases attracted our attention, and found the reprint very accurate; but some of the authorities cited in the original are occasionally omitted. The reason of this is not stated, and we think that in future the references should be preserved, or some sufficient explanation afforded.

On the THIRD REPORT of the REAL PROPERTY COMMISSIONERS.

(*Continued from p.* 293.)

COVENANTS.

The important subject of Covenants next engages the attention of the Commissioners. They come to the conclusion with the greater number of writers on the point, that the distinction between Real and Personal Covenants, depends on the fact of their relating, or not relating, to land, and not on the nature of the remedy for their breach. They then state the law on the subject with clearness and ability. They recognize the well-known rules laid down in *Spencer's case*, 5 Co. 17.; as shewing what covenants run with the land, and then mention in detail those covenants that have this quality, and those that have not. They consider the existing distinctions to be artificial, and propose that they shall be abolished; and that *all* covenants entered into by lessees in leases, unless an intention be expressed to the contrary, "or is to be inferred from the instrument," shall be binding on every assignee of the term. The words in inverted commas will lead, we fear, to considerable litigation; and we would rather propose that every covenant should bind the assignee, *unless* it were expressed that they should not have that effect.

The Commissioners then proceed to inquire in what cases the benefit of the lessee's covenants passes to the assignee of the reversion; and they consider the distinctions in this case also to be useless, and propose that the benefit of every covenant shall be transmissible to every assignee of the reversion. They further propose, that every covenant entered into by the lessor shall bind the assignee of the reversion, to the extent of the value of the land, but not beyond; and, where an intention to the contrary does not appear, that covenants shall run with the land, so as to entitle the assignee to maintain an action for the breach of them. They also recommend that remedies for rent and on covenants shall not be lost by the merger of the immediate reversion.

The Commissioners then state the law relating to covenants and conditions against assigning or underletting without consent, and the well-known rule in *Dumpore's case* (4 Co. 119 b), that if a license to let be once given, the condition or covenant is gone for ever. They mention that this rule has been altered in Ireland by the subletting act (7 Geo. 4, c. 29. §§ 1 & 4[a]), and state, very justly, that it has been found inconvenient; and they propose to do away with the rule, which is in truth absurd and unreasonable, and to declare that a license of this kind shall in future have no such effect, but shall only authorize the particular act consented to.

The Commissioners then proceed to state the law as to covenants, when the relation of lessee and reversioner does not subsist. And, *first*, as to covenants made *with* the owner of the land to which they relate,—such as covenants for title, covenants to indemnify against existing charges, and to get in outstanding estates. They mention the technical difficulty relating to covenants, when lands are conveyed to the usual uses to bar dower, or settled to uses; when if they be conveyed to a releasee to uses, instead of to the purchaser, the covenants, if entered into with the latter, will be separated from the land, or covenants in gross. This rule is very properly proposed to be abolished; and they recommend that in all cases the benefit of covenants entered into with the owners of land, shall run with the land, for the benefit of every person taking the land, or any estate or interest in it, either under the covenantee, or any act of the covenantee, notwithstanding any want of privity of estate with the covenantee.

The Commissioners treat, *secondly*, of covenants entered into *by* owners of lands; and first allude to the practical difficulty

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[a] It is stated in a note, that an alteration of this act is now under consideration. This, we can add, has been effected in the present session by the act, 2 W. 4. c. 17, which repeals 7 G. 4, c. 29.

which arose in the case of *Roach* v. *Wadham*, *6 East*, 289; and they propose that the burthen of covenants of any description, entered into by the owners of the land, should in no case run with the land, so far as concerns the legal remedy. They then consider those covenants where the covenantee has no interest beyond the covenant,—as covenants entered into by the owner of lands with the owners of adjoining lands, that the former shall not be built upon, &c. They mention that doubts have been frequently entertained of their validity, and particularly as to whether they would run with the land, so as to bind all successive owners of it. Supposing the usual rule on the subject (meaning those of *Spencer's* case) to be applicable, they think this doubt unfounded. They consider, however, the state of the law on this subject to be so unsatisfactory as to require alteration; and they propose to declare, that at law, and for the purpose of conferring a legal right of action, the burthen of them shall not be considered as running with the land, but reserving the jurisdiction of Courts of Equity to interfere, by injunction or otherwise, for enforcing performance of such covenants, in all cases in which such Courts may deem it proper so to do, and that such covenants should be declared legal.

The Commissioners, *thirdly*, consider the subject of Covenants relative to the production and custody of title-deeds. They state how such covenants came to be introduced, and they then state the existing law on the subject, and the alterations they propose. As we are not aware that the law is so well stated anywhere else, we shall extract this portion of the report.

In a recent case (1 Sim. & Stu. 449), where the vendor had not the custody of the original deeds, but had a covenant for production of them, it was decided that the title was not marketable, because the covenant did not at law run with the land.

It had previously been supposed, either that an original independent equity existed, entitling any party, interested in a deed, to call for its production by any other person having the custody of it, or at least that such an equity existed wherever the parties requiring the production, claimed under a person who had taken the precaution to procure a covenant for that purpose, and the person having the actual custody of it, derived that custody from or through a person who had entered into such a covenant. In practice it was not considered, that a court of equity would regard the subtle distinctions which we have already stated as prevailing in courts of law between covenants which do, and those which do not, run with the land; distinctions so little understood, that we believe few lawyers would undertake to lay down their exact boundaries. The consequence of the decision to which we have just alluded is, to create an embarrassment in conveyancing, which none but those engaged in its daily practice can be sensible of; for, of the numerous cases in which the muniments of title to property are to be resorted to under existing covenants for production of them, a very small proportion will be found in which the covenant could be said actually to run with the land to which the deeds relate. Provisions on this subject are now often inserted in conditions of sale by auction, and in private contracts, which, being prepared by unskilful persons, or without due consideration, lead to difficulties and litigation.

It seems to us to be a proposition founded in justice, or general convenience, that when several persons are interested in the contents of a deed, each of them should have the means of compelling its production on all lawful occasions.

From the proceedings which prevailed under the old law when warranties were in use, we think it may reasonably be inferred, that the owner of the land for the time being, who had not the custody of the title deeds, had always the means of procuring their production for the purpose of obtaining the benefit of the warranties of preceding owners; and it had been concluded by many practitioners, that since the interference of Courts of Equity had been introduced upon its present footing, a direct and effectual mode of attaining the same object existed in Chancery.

In favour of coparceners, and in cases of partition under decrees, this equity appears always to have prevailed, and in all other cases where the ownership of lands held under one title has become divided, there seems equal reason for it.

In the case of an estate sold in lots, the rule long established in practice has been, that the party purchasing the more valuable portion of the property should have the custody of the deeds, and enter into a covenant for the production of them to the other purchasers. It is probable that this covenant was originally taken to give a remedy at law as well as in equity, but that in process of time the practice of taking such covenants occasioned them to be considered as the sole foundation of the right.

When conveyances were made to uses, it was considered that the right to the custody of the deeds was in the feoffees to uses and their heirs; but they could only have been entitled to hold them as depositories for the benefit of all parties interested. There must therefore have been a clear equity to compel them to produce the deeds.

The case between mortgagor and mortgagee is peculiar. The possession of the deeds is considered a substantial part of the security, and the mortgagee cannot be compelled to produce them, or allow their inspection, till his debt is paid. The remedy for any one claiming under the mortgagor, who may wish to obtain possession of the deeds, is to pay off the mortgage. The effect of this doctrine is,

in many cases, to prevent the mortgagor from dealing with his equity of redemption; and upon the whole we see no sufficient reason for continuing this privilege to mortgagees.

From these considerations we have come to the conclusion, that the proper mode of removing the difficulty as to title deeds will be to declare, that every person showing a right or interest, legal or equitable, in land, consistent with the title of the party holding the deeds, may compel the production of them; and we see no reason why such a right should not be enforced by the simplest legal process, such as an order made by a single Judge. It will be proper to place some limit to the facilities which such a law would afford, for it would be easy for any one to pretend an interest in land, and it might be extremely difficult to disprove the existence of such interest without the production of the deeds, while to produce them would be to give success to the fraud intended. The existence of a covenant to produce the deeds has some advantage in this point of view, because it ascertains the party entitled to claim the production; but we think that is not sufficient to warrant a restriction of the right to the particular case where such a covenant exists. We think the party, who seeks a production of the deeds, should be required to state a *primâ facie* case, upon affidavit, before a Judge at chambers. The party having the custody might answer this case in the same manner, and if there was no greater difficulty than the Judge could decide on such affidavits, relief might be given, and an order to produce the deeds made; if a case of doubtful right should be disclosed, it might be proper to leave it for a more solemn decision. In such a case, we think the party, seeking to enforce a production of the deeds, might be left to institute a suit in equity, in which all equitable circumstances might have due consideration.

An action on the case might be given to a party interested in the preservation of a deed, to recover damages against any other party, having the custody of it, for any injury or damage which he may sustain, from its being lost or destroyed under circumstances of fraud or gross neglect.

We should remark, in conclusion, that the whole of this portion of the Report is full of practical information, and must alone be found of much service to the Profession.

NEW BANKRUPT COURT, AND CONDUCT OF OFFICIAL ASSIGNEES.

Mr. Editor,

Allow me to request the attention of yourself and readers to a few observations on that part of Lord Brougham's new Bankrupt Act, relating to the appointment of official assignees, and their conduct under it. I believe I am right when I assume that the main ground urged for appointing official assignees, was, that assignees and solicitors, under the *old* system, frequently retained monies, belonging to the estate, in their own hands, and improperly made use of them, instead of paying them into the bankers appointed, whereby bankrupts' estates often sustained losses; and, therefore, the official assignee was, by the new act, associated to the creditor's assignee, to prevent the latter interfering at all with, or receiving any part of, the bankrupt's effects; and the official assignee was to be subject to the rules of the Court as to paying in the monies received by him. Now let us mark the precision with which the Court makes its rules to bridle these officers. One of the rules directs, that "each official assignee shall pay in, &c. all such sums of money as shall come into his hands as soon as they shall amount to 100*l.*;" so that while they remain under that sum, there is no rule to compel him to pay them in till a dividend be wanted! He may have ten, twenty, or more estates in this condition; he may collect 50*l.* or 90*l.* under each, and keep them all in hand till they are wanted for a dividend—frequently five or six months, sometimes more,—the very evil for the prevention whereof they were appointed. To this it may, perhaps, be answered, that the evil is not so very great; that they must pay in when the sums amount to 100*l.*; that the rule is positive, &c. True, but what is the punishment, if they disobey?—if, in the teeth of this rule, they improperly keep monies in hand above 100*l.*? I cannot tell; perhaps some of your readers can. The Court has made a rule, in pursuance of the act, declaring what they will have done, but they have annexed no punishment for the disobedience of it. [Our correspondent states an instance of abuse; but the circumstances must be fully verified before we can publish the statement.] How a defaulter is to be punished I do not perceive; for the 20*l.* per cent. clause, § 104 of 6 Geo. 4, is so ambiguous that I do not think it could be brought to bear effectually on an official assignee. After the persecuting zeal which I have seen them display, unnecessarily annoying assignees under old commissions, I think some notice of their conduct ought to be taken, or we may expect in a few years another mountain of abuses, which will require the arm and nerve of a future Lord Brougham to remove. In conclusion, allow me to add, that I never could see any utility whatever in the "thirty," who are abstracting 2½ per cent. from bankrupt's effects, for merely handing them backwards and forwards. Would not an accountant-general in bankruptcy at a salary, and an order of the Court that assignees (not official) and solicitors should pay in *all* monies (without waiting till they amount to 100*l.*!) within twenty-four hours after receipt (verified by oath) of each sum, and a graduated penalty according to amount, without any power of remission, on every default,—would not this have a much better effect in procuring the due and prompt paying in of monies belonging to bankrupt's estates,

and enable us to dispense *in toto* with these officious and expensive personages? J.

[Although we cannot concur in the whole of our correspondent's remarks, we have reason to believe that the compulsory appointment of official assignees is not agreeable to creditors in general—for whose benefit they were professedly created; and they may be supposed competent judges of their own wants and interests. In many cases, the creditors would rather go without the assistance of an official assignee on the terms imposed. In the old commissions also, we believe that much trouble, inconvenience, and expense are occasioned, without adequate advantage. But it is said that the commissioners have no choice, and must proceed to take the accounts, although it may be shewn, either that there is nothing whatever to divide, or that the expense of the proceeding will consume the trifling residue which the assignees may possess, after the strictest investigation of the account. If this be so, the act ought to be altered.—Ed.]

SELECTIONS FROM CORRESPONDENCE.

No. XIII.

AFFIDAVITS IN BANKRUPTCY.

To the Editor of the Legal Observer.

Sir,

I do not reply to your correspondent "Amicus Curiæ" in the spirit of contradiction, but merely to express my belief that he labours, in some measure, under a mistake regarding this matter,—or rather, I should say, if he is right in the opinion he has propounded, the Registrar, of whom I particularly asked the question, has misled me, as well as many others, and been the unconscious instrument of incurring that expense which ought to have been saved. He told me, without the least hesitation, that all affidavits arising in the prosecution of a country fiat, *must* be sworn at the Public Office, inasmuch as the country tribunal was an independent court, unconnected with, and not in any way amenable to, the jurisdiction of the Court of Commissioners in Basinghall Street, *which only recognised its own proceedings*. Upon his *ipse dixit*, therefore, my movements were guided. Again,—admitting that all affidavits may be sworn before the *Court of Review*, and not before the Court of Commissioners, the relief thereby will still be limited, and confined to the practitioners and their clients residing at the west end of London, so long as that Court carries on its proceedings at the present *locus in quo*; and I have only to observe further, that if your correspondent is correct in his opinion (and I sincerely wish he may be) the sooner it is generally known the better.

Aspiro.

ARTICLED CLERKS.—EXAMINATION.

Sir,

It is a complaint that the profession of attorneys is too much crowded. I propose the following remedy for the evil:—Limit the privilege of taking articled clerks thus;—no one to take a clerk till of *five* years standing;—no one to take two till of *ten* years standing; and no person to take more than two. Let the pupil be apprized, when articled, that he will undergo a strict examination before he is admitted, and let such admission be limited to the age of twenty-two and upwards. By this means, persons without business will not be able to give the qualification to articled clerks, and the profession will be soon cleared of improper members. The writer of this served his clerkship for a fee of 300 guineas, to a rich, but ignorant and idle practitioner, without sufficient business to instruct a clerk, and he has ever since been a burthen to himself and his friends, misleading his clients and connections, and committing all sorts of blunders. The examination would have relieved him from these evils. According to the present practice, persons are admitted on the mere certificate of the master, without any examination. I will venture to say, that in ten years, by the adoption of this plan, the profession would be most materially thinned, and its members much more respectable.

An Attorney.

TRESPASS.—BAILIFFS.

To the Editor of the Legal Observer.

Sir,

Knowing your disposition to record cases which are likely to be important relative to appeals, I beg to point out one of a nature highly interesting on that head, tried at the Westminster Sessions on Friday the 31st of August, namely, ——— v. *Spink*. It was there decided (contrary to the generally received opinion) that the individuals employed by sheriffs' officers, or officers of courts of requests, were perfectly justifiable in entering the dwellings of persons, against whom they might hold writs or executions, and that the same protection was afforded by the laws to such individuals as to the officers themselves.

R. S.

SALARIES OF THE JUDGES.

KING'S BENCH.

The Judges of the Courts of King's Bench, Common Pleas, and Exchequer have made a return to Parliament of their respective salaries, with the fees and emoluments of their clerks, marshals, associates, and other officers. The statements of the several Puisne Judges are in substance the same. We shall, for the present, select those of the Chief and other Judges of the King's Bench.

Lord *Tenterden* states, that "the office of Lord Chief Justice of the Court of King's Bench was regulated by the statute 6 Geo. 4, c. 82, by which his salary was fixed at 10,000*l.* per annum, in lieu of all fees and pecuniary emoluments. Since the passing of that act, the portion of the fees and pecuniary emoluments formerly accounted for and paid to the Chief Justice by some of his own officers, and also by some of the officers of the Court, have been paid into the public treasury by the persons who had before paid them to the Chief Justice, and he has had nothing to do with any matter of that kind. This act of parliament was in the nature of a bargain between the public and the office of Chief Justice. The fees and pecuniary emoluments transferred from the Chief Justice to the public treasury formed a part only, and considering the office of Chief Justice as a corporation sole, not the most important part, of the consideration for the increase of the salary. Some of the great offices of the Court, of very great annual value, though almost entirely sinecures, or executed by deputy, were in the gift of the Chief Justice, and were deemed to be saleable by him; some parts of the family of the two predecessors of the present Chief Justice certainly, and probably also of his third predecessor, were, and those of the two last predecessors still are, in the receipt of considerable emoluments, derived from those offices; although such emoluments have from various causes been of late much diminished, and are likely still further to decrease. The act not only abolished the future sale of those offices, as well as of offices held under them, after the death of the present principal officers, but ordained also that every officer to be thereafter appointed should receive such portion only of the lawful fees of his office as should be from time to time allowed by the Chief Justice and the Lords of the Treasury, and should account for, and pay over, all the residue to the public, and exercise the office in person. And this, as is expressed in the preamble of the statute, was done, that 'a more constant provision might be made for maintaining the honour and dignity of the office of Lord Chief Justice, and a fund be thereafter raised which may be applied to the payment of the salaries of the Chief Justice and other Judges of the Court, in ease of the public revenue.'

"Upon the circuits, the Judges act under his Majesty's commission, and not as Judges of the Courts, and the fees received on the circuits do not properly belong to them, in their character of Judges of the Courts. But perhaps the order may be intended to apply to them. These fees are 6*s.* 8*d.*, paid over by the marshal, on the entry of a cause or traverse for trial, and in some few instances double that sum, *viz.* 13*s.* 4*d.*; and 1*l.* out of the glove-money paid by the sheriff when the occasion occurs. These fees are carried into the general or housekeeping account, the amount of which is divided between the two Judges, each of whom pays his own travelling expenses separately. The amount of the fees on entries on the senior side of the summer circuit of the last year was 22*l.*, the glove money 1*l.* The expenses of the senior Judge over and above that sum of 23*l.*, amounted to 255*l.* 8*s.* 11*d.*"

Mr. Justice *Littledale's* return is as follows:

"My salary as a Judge of the Court of King's Bench, under the statute 6 Geo. 4, c. 84, § 2., is 5,500*l.* a year.

"I am the second Judge of the Court; and by writ of Privy Seal an allowance of 40*l.* a year, at the rate of 10*l.* in every term, is assigned to the second Judge of the Court of King's Bench, for giving the charge to the grand jury, and pronouncing judgment in the Court against persons who are convicted of offences, and are brought up for judgment.

"The payment of this termly allowance of 10*l.*, making 40*l.* a year, in addition to my salary of 5,500*l.* a year, is sanctioned by the statute 6 Geo. 4, c. 84, § 7, as it had been in addition to the Judge's salary under 49 Geo. 3, c. 127, § 4.

"As a Judge of the Court of King's Bench, I have no fees or other emoluments, except what is before stated.

"The expenses of circuits and chambers are paid by me out of this salary.

"All delegates, in appeals from the Ecclesiatical Courts, including the Judges, receive one guinea for each day's attendance; which fees amount to about six or seven guineas in the course of a year.

"My clerks have no salaries; they receive certain fees, no part of which do they pay over to me.

"I have no associate.

"As a Judge on the circuit I have a marshall, who receives fees according to the quantity of business done.

"I have also a crier on the circuit; the crier pays over nothing to me.

"The marshal pays over to me 6*s.* 8*d.* in each cause from the Courts at Westminster entered at those places where, as a Judge of Assize, I preside on the civil side, and 6*s.* 8*d.* on each traverse entered, when I preside on the criminal side; and the entries of what are called foreign records at Durham are 12*s.* 4*d.* each; and the entries on those records which come from the Crown Office in London, are, on all the circuits, double of what the others are.

"There is also paid by the sheriffs 1*l.* in lieu of the customary donation for gloves at those places where there is no execution.

"These sums, which were paid to me on the Midland Circuit in the summer of 1831, together with 13*s.* for private verdicts, amounted to 15*l.* 13*s.*; and on the Oxford Spring Circuit, in 1832, amounted to 30*l.*

"All these sums are applied, according to usage, towards the payment of the circuit expenses.

"After deducting a moiety of the aggregate of these sums, and of the corresponding sums paid to the other Judge on the circuit, my expenses of the Midland Circuit in the Summer of 1831, amounted to between 250*l.* and 260*l.*; and my expenses on the Oxford Circuit, in the Spring of 1832, amounted to between 320*l.* and 330*l.*

"Those Judges who go the Northern Circuit receive fees in respect of fines and recoveries in the Common Pleas at Lancaster and Durham; and those paid to the senior Judge are greater in amount than those paid to the junior Judge. They also receive ancient stipends paid by the Duchy of Lancaster and the Bishop of Durham as Judges of the County Palatine Courts.

"All these sums are also applied towards the payment of the circuit expenses."

The salary of Mr. Justice *James Parke*, under the same statute (6 Geo. 4, c. 84, § 2.) is 5,500*l.*, and, except the 40*l.* a year to the senior Judge, his return is nearly the same as that of Mr. Justice Littledale. The average of circuit expenses, after crediting all receipts, is 600*l.* per annum.

Mr. Justice *Taunton's* salary (under 1 W. 4. c. 70), is 5,000*l.* His circuit expenses were 853*l.* 1*s.* 6*d.* for three circuits, including the winter circuit.

Mr. Justice *Patteson's* salary (under 11 G. 4. 1 W. 4. c. 70. § 2), is also 5,000*l.*, and, including the Winter Circuit, the annual expenses were 880*l.* at the least.

[*To be continued.*]

SUPERIOR COURTS.

VICE CHANCELLOR'S COURT.

BANKRUPTCY.—EVIDENCE.—FRAUD.

The acknowledgement and oath of the bankrupt are not admissible evidences either before the Commissioners, or in this Court, to prove a debt. Entries, made regularly in the bankrupt's books, are evidence, but a letter to him, demanding payment, is not evidence of a debt, as it may be concocted in fraud.

Parties claiming to be creditors, upon the evidence of entries in books which are not produced, may file a bill for the production of them.

Any money received by persons, in fraud of the real creditors of the bankrupt, is to be paid with interest.

His *Honour*, in giving judgment in this case, said it was a bill filed by the assignees of Thomas Chandler Biggs against several defendants, respecting certain bills of exchange and shares in the Rock Mining Insurance Company. It appeared that in 1828 the bankrupt, T. C. Biggs, met with very considerable losses. He had a brother, William Biggs, who carried on business at Devizes; a sister, residing at the same place; and another brother, John, an attorney at Grey; and a brother-in-law, William Woodman, residing at Marlborough. It appeared that the bankrupt, having met with difficulties in procuring discount for bills of exchange, in January, 1828, he wrote to his brother William, representing his desire to raise money on his shares in the Rock Mining Insurance Company, and instructing him to procure a power of attorney to enable him to make the necessary arrangements to raise the money. The power of attorney was procured, and the bills were sent to Devizes, but all attempts to procure money there, by discounting the bills, were ineffectual. On the 20th of January William Biggs came to London, and on the 21st an interview took place at the house of the bankrupt between the three brothers and William Woodman. The conversation then turned upon the difficulties that T. Biggs had met with in the disposal of his shares, by reason of another person, who was also a shareholder, being also in difficulties and unable to meet the demands upon him. It was plain, at this interview, no demand was made upon the bankrupt by his brother William Biggs, for the payment of any debts due to him. It was said that the bankrupt was at this time indebted to his sister, Mrs. Hanniwell, 500*l.*, and to his brother William 1,500*l.*; and that a demand was made on the bankrupt, by William Biggs, for payment of the two sums, and in consequence of this demand the bankrupt gave William Biggs several bills of exchange, one of them drawn on a third person for 1,000*l.* William Biggs sent to his wife at Devizes, and she came to town on the 24th; and whilst William Biggs was ill in bed, he delivered to John Biggs, by the hands of his wife, a parcel, containing three bills, amounting to 2,062*l.* It appeared that the power of attorney was executed in the presence of two other persons. On the 27th of January, William Biggs died, and on the 29th of February a transfer was made by the bankrupt in the name of John Biggs, jun., the son of William Biggs. It was said that this transfer and delivery of bills took place in consequence of certain debts existing between the parties, and in respect of previous agreement. On examination of the evidence there was no proof of the existence of any debt which the bankrupt owed to his sister, Mrs. Hanniwell, beyond the fact that the bankrupt himself had sworn that he was indebted to Mrs. Hanniwell in the sum of 500*l.* This was the only proof of the existence of such a debt, and this proof was not admissible. With respect to the debts represented to exist between the bankrupt and William Biggs, two bills of exchange were offered in evidence, which were stated in the bankrupt's hand-writing to be for value re-

ceived; but there was nothing shewn in the books of the bankrupt that went to support the existence of any debt owing from him to William Biggs. But the defendants referred to some entries in books which were not produced. Now, it appeared to him that it would not be right to have further inquiry made by the production of other books; for if there really were any other books than those already produced, it was competent for the defendants to file a cross bill for the production of those books. With respect, therefore, to the debts stated to be due to William Biggs, if they existed, why was there no evidence adduced in support of the fact? It appeared upon the examination of the books, that the entries there went to shew, not that William Biggs was the creditor of the bankrupt, but on the contrary, that he was a debtor to the bankrupt in the sum of 18*l*. The only proof of the existence of any demand upon the bankrupt from his brother William, was a letter from the latter to the former, simply stating that he was distressed for some money, and requiring a certain sum. But what proof was there that this letter was not made for the purpose? He was of opinion that the whole was a fabricated transaction; and that it was intended by the delivery of the bills of exchange to secret the property of the bankrupt from the lawful creditors. With respect to the shares in the Rock Mining Insurance Company, it appeared that no policy had been effected. After the death of William Biggs, difficulties arose in the arrangements between the bankrupt and Elizabeth the wife of William Biggs, as to the manner in which the transfer of the shares was to be made, and also as to the person on whose life the policy was to be effected. He was of opinion that these shares were transferred, not for the purpose of paying any debts owing by the bankrupt, but solely for the purpose of secreting the property from the creditors. When he considered the transactions which were sworn to have taken place, and when he observed the many discrepancies in the examination of the bankrupt before the commissioners, and as a witness in this Court, and also the many erasures in his books, he had come to the conclusion that the business was a deliberate and fraudulent transaction between the parties, to defraud the bankrupt's creditors. As John Biggs, jun. had chosen to mix himself up with these matters, and as Mrs. Hanniwell had interfered to receive benefit, he felt bound to issue a decree against them with costs, but this did not apply to William Woodman. His opinion, therefore, was, that as to Woodman the bill should be dismissed with costs, and as to all the other defendants the decree should be issued with costs. The parties would have to pay interest on any money they had received on the bills, from the receipt up to the present time.

Smith v. *Biggs and others*. Sittings in Lincoln's Inn after Trinity Term. V. C.

KING'S BENCH.—PRACTICE COURT.

BAIL BOND TO STAND AS SECURITY.

Where regular proceedings have been commenced upon a bail bond, and the defendant has rendered after the time for perfecting bail above, the Court will order the bail bond to stand as a security, under rule 5, Reg. Gen. 2 W. 4.

Wightman shewed cause against a rule for staying regular proceedings on the bail bond, on payment of costs. The only question was, whether the bail bond should stand as a security. He should contend, that it ought to stand as a security. The plaintiff had lost a trial after declaring conditionally; and the defendant had rendered after the time for perfecting bail had expired.

Busby, contrà, cited rule 5. Reg. Gen. H. T. 2 W. 4, the words of which were, "that upon staying proceedings, either upon an attachment against the sheriff for not bringing in the body, or upon the bail bond, on perfecting bail above, the attachment or bail bond shall stand as a security, if the plaintiff shall have declared *de bene esse*, and shall have been prevented, for want of special bail being perfected in due time, from entering his cause for trial, in a town cause, in the term next after that in which the writ is returnable; and in a country cause, at the ensuing assizes." Here the defendant, having rendered instead of perfecting bail above, the case did not come within the above rule, but was a *casus omissus*.

Patteson, J.—Rendering is equivalent to perfecting bail above. In the case of render, there are still stronger reasons for the bail bond standing as a security.

Rule absolute, the bail bond standing as a security. *Hodge* v. *Hopkins*, June 6th, 1832. K. B. P. C.

BAIL.—COSTS.

If a plaintiff alarm bail who have been put in, and thus prevent them from justifying, the Court will compel him to pay the costs of putting them in.

Hutchinson shewed cause against a rule obtained by *Busby*, for compelling the plaintiff to pay the costs of putting in three different sets of bail, on the part of the defendant. The plaintiff, it appeared, had gone to the bail after they were put in, and by stating to them the danger they incurred by becoming bail for the defendant, who was a prisoner, so alarmed them, that they refused to appear to justify. The consequence had been, that the defendant was forced to put in fresh bail.

Patteson, J.—The rule must be made absolute. The plaintiff has no right to go and make use of any inducement to prevent the bail from appearing to justify. He has only a right to make inquiries into their sufficiency.

Rule absolute, with costs.—*Gwynne, gent. one, &c.* v. *Fuller*. June 10th, 1832. K. B. P. C.

JUDGMENT AS IN CASE OF A NONSUIT.—NOTICE OF TRIAL.

Where a default in proceeding to trial has been made by a plaintiff, but the defendant does not move for judgment as in case of a nonsuit, until after fresh notice of trial, he is still entitled to his judgment.

In all cases of peremptory undertaking, though the cause may be in the paper, a fresh notice of trial must be given.

Platt shewed cause against a rule for judgment as in case of a nonsuit. Notice of trial was given for Michaelmas term, 1831, and the record withdrawn. The cause was afterwards set down for the sittings after Easter term, 1832, and notice of trial given. Judgment as in case of a nonsuit was moved for in T. T. 1832. The defendant should have applied before fresh notice of trial given; and not having so applied, he has waived the default. The defendant, therefore, is not entitled to have his judgment. The cause is still in the paper, and several hundred off.

Patteson, J.—It is no answer to this rule, that you have given notice of trial before application made for judgment as in case of a nonsuit. The rule must therefore be made absolute, unless you give a peremptory undertaking to try at the sittings after this term. You must also give fresh notice of trial, although the cause is in the paper. This was decided by Mr. J. *Littledale*, in the case of *Sulsh* v. *Cranbrook*. [a]

Rule discharged, on plaintiff's giving a peremptory undertaking to proceed to trial at the sittings after T. T.—*Bainbridge* v. *Purvis*. June 10th, 1832. K. B. P. C.

AFFIDAVIT OF DEBT.—INDORSEE AND ACCEPTOR.—BILL OF EXCHANGE.

In an action by an indorsee against the drawer, the affidavit of debt should allege the default of the acceptor

Curwood shewed cause against a rule for cancelling the bail bond, on the ground of a defect in the affidavit to hold to bail. It was an action by an indorsee against a drawer of a bill of exchange. The alleged defect in the affidavit to hold to bail was, that no default by the acceptor was stated in it. Such a statement was not necessary. He cited *Bradshaw* v. *Saddington* [b], and *Elstone* v. *Mortlake* [c].

Steer contended, that it was necessary to state the default of the acceptor, as was decided in the case of *Buckworth* v. *Levy* [d], afterwards recognized in *Cross* v. *Morgan* [e].

Patteson, J.—I think my brother *Littledale* was right in his judgment, in *Cross* v. *Morgan*; but I will mention the point to the other Judges. . . . . *Cur. adv. vult.*

June 12th.

Patteson, J.—I have referred to the Judges in the other Court, and they are clearly of opinion, that the decision of my brother *Littledale* is correct.

Rule absolute.—*Banting* v. *Jadis*, June 11th, 1832. K. B. P. C.

BAIL.—JUSTIFICATION.

Rule 4. of T. T. 1 W. 4., which entitles defendants to have the recognizance entered into under Rule 3, if no exception be entered by the plaintiff out of Court, without further justification, does not apply to the case of a prisoner.

Turner, on the coming up of bail to justify, contended on behalf of the defendant, who was a prisoner, that he was entitled to have the recognizance of bail out of Court, under rule 4 Reg. Gen. T. T. 1 W. 4, without further justification, the bail having made the affidavit of justification prescribed by Rule 3. of the same term, which had accompanied the notice of bail, and the plaintiff not having given notice of exception.

V. Richards contended, that the rule did not apply to the case of a prisoner, as in that case it was not necessary to except in order to compel justification.

Patteson, J.—This rule does not apply to the cases where notice of exception is not necessary. It is not necessary in the case of a prisoner, as there the bail must justify without exception. The defendant is therefore not entitled to have the recognizance out of Court, without further justification.

Bail justified.—*Webb's bail*, June 12th, 1832 K. B. P. C.

NOTES OF THE WEEK.

STATE OF COMMON LAW BUSINESS.

From the information we have collected of the number of writs issued by the Courts of King's Bench and Exchequer of Pleas, from the commencement of Trinity term to the 21st August inclusive, it would appear that there is no lack of legal business.

In the Court of King's Bench, the *latitats* issued in the course of Trinity term last, were	2707	
In the Vacation, up to and including 21st August . .	2394	
		5101

[a] 1 Dowl. Prac. Rep. 148.
[b] 7 East, 94.
[c] 1 Chit. Rep. 648.
[d] 7 Bing. 251.
[e] 1 Dowl. Prac. Rep. 122.

Bills of Middlesex during the term	1087	
In the Vacation, to 21st of August inclusive . . .	1214	
	——	2301
		7402

This number does not include writs of special original.

In the Exchequer of Pleas, the number of writs issued during the Term was . . .	4609	
In the Vacation, to the above date	3699	
Total writs in the Exchequer of Pleas, exclusive of 36 *Subpœnas ad respondendum* . .		8308
Total in King's Bench		7402
		15,810

Trinity term having commenced on the 26th May, the period included in the above statement is a few days short of three months. Taking this as a fair average, the annual number of writs in these two Courts is 63,240.

We have not sought for the like information from the Court of Common Pleas, where the business, we understand, is considerably less; but the grand total may, however, be stated at about 75,000.

It must be recollected, however, that large as is this mass of business, it would not average, if equally distributed amongst all the attorneys who actually take out their annual certificates, more than nine or ten writs annually to each individual.

REGISTERING BARRISTERS UNDER THE REFORM ACT.

Northern Circuit.

Yorkshire.	
North Riding	Mr. Wilkinson and Mr. Gray.
West Riding	Mr. Raincock, Mr. Dodd, and Mr. Drinkwater.
Lancashire.	
North	Mr. Temple.
South	Mr. Heywood, Mr. Hildyard, & Mr. Atkinson.
Westmoreland	Mr. Kay.
Cumberland.	
West	Mr. Robinson.
East	Mr. Maude.
Northumberland	Mr. Peel & Mr. Ellis.
Durham	Mr. Brandreth, Mr. Losh, and Mr. Venables.
Boroughs.	
Cockermouth and Whitehaven	Mr. Robinson.
Newcastle and Shields	Mr. Peel and Mr. Ellis.
Sheffield, Halifax, Huddersfield, & Pomfret	Mr. Raincock, Mr. Dodd, and Mr. Drinkwater.
Lancaster and Bradford	Mr. Kay.

ANSWERS TO QUERIES.

LAW OF ELECTIONS.

ELECTIVE FRANCHISE.—LAND TAX. P. 288.

1. If the leasehold premises in question partake of the nature prescribed by the act, namely, of an unexpired residue of a term originally of sixty years, of the clear yearly value of 10*l.*; or of any term originally not less than twenty years, of the yearly value of 50*l.*; or being lands or tenements for which a *bonâ fide* yearly rent of not less than 50*l.* is paid, I am of opinion, that a right to vote is conferred *for the borough* in which such premises are situate; and by analogy, the purchasers of land tax *arising thereout*, are to be taken to have a *fee-farm rent*, to the amount of the land tax purchased, and if the amount be sufficient, the tax so redeemed gives a right to vote (Heyw. 63, and § 18.) *for the same borough*, and not for the county of Middlesex; as § 25. expressly declares that no person shall vote for a county, in respect of certain copyholds *or leaseholds in a borough*. Cockburn, p. 15, observes in n. (a), that "the effect of this and the foregoing section, is *to take away* the right of voting for counties, for property in respect of which a right of voting may be acquired in cities or boroughs, whether such right shall have been actually acquired or not;" and afterwards draws the important line of distinction between *freeholders* on the one hand, and copyholders and *leaseholders* on the other. ASPIRO.

2. As sections 27 and 29 give *A.* and *B.* a right of voting for the borough, in respect of the premises occupied by them; and § 24. enacts, "that no person shall be entitled to vote in the election of a knight of the shire, in respect of his *estate or interest* as a freeholder in any house *occupied by himself*, of such value as would confer the right of voting for any city or borough," I think *A.* and *B.* clearly do not retain their elective franchise for the *county*. J.

REFORM ACT.—JOINT OCCUPIER. P. 271.

The 27th clause gives the right of voting for a borough, to "every male person of full age, and not subject to any legal incapacity, who shall occupy, within such borough, as owner or tenant, any house, &c. being either separately or jointly with any land within such borough, occupied therewith by him as owner, or occupied therewith by him as tenant under the same landlord, of the clear yearly value of ten pounds," provided he has been duly registered; but which is not to be done, unless he shall have occupied such premises for twelve calendar months next previous to the last day of July, nor unless he shall have been rated to the poor-rate, and paid the rates payable by him on the 6th of April, nor unless he shall have resided for six calendar months next previous to the last day of July within such borough, or within, &c. It appears to me, that the intention of the act is to prevent him acquiring such right by occupying premises separately of smaller value, but jointly of the value required, under different landlords, and not to prevent one joint occupier from acquiring such right, because he does not occupy under the same landlord as his co-occupier does. For the 29th clause enacts, "that where any premises as aforesaid in such borough shall be jointly occupied by more persons than one, as owners or tenants, each of such joint occupiers shall, subject to the conditions hereinbefore contained as to persons occupying premises in such borough, be entitled to vote in the election for such borough, in respect of the premises so jointly occupied, in case the clear yearly value of such premises shall be of an amount which, when divided by the number of such occupiers, shall give a sum of not less than ten pounds, but not otherwise." The conditions therefore are, that each joint occupier must occupy all his premises under the same landlord, and not that all the joint tenants shall occupy under the same landlord; and that they must comply with the proviso in the 27th clause, as to occupation for a twelvemonth; poor-rate and residence. Therefore, if *B.* is in the occupation of premises of the value required by the act, and has duly complied with all the provisions thereof, he will be entitled to vote. X. Y.

COMMON LAW.

FATHER'S LIABILITY—MINOR. P. 288.

If, in this case, the father would be answerable had the son resided with him, it is presumed he is equally so, though he reside with his mother; as it cannot be contended that this fact alone should take from him all responsibility. The chief point appears to be, whether or not the debt was contracted for actual necessaries. If a tradesman trust an infant, he does so at his peril, if it turns out he has been properly supplied. *Story* v. *Pery*, 4 C. & P. 526. Under the circumstances, however, I see nothing to discharge the claim upon the father; as it is stated, a trifle only was allowed by him for the maintenance of his wife and child. M.

LAW OF PROPERTY AND CONVEYANCING.

LEGACY. P. 271.

I cannot perceive any thing repugnant to the testator's intention, that the wife should take her legacy as one of the guardians; it does not appear inconsistent with the prior bequest, which, I take it, is the only ground, in this case, of objection. I cannot see any thing to raise a question of election; and should therefore say, that the wife is entitled to her legacy as guardian. J.

VOLUNTARY SETTLEMENT.—CREDITORS. P. 288.

1. This question is one which comprises so many points, that upon the whole, I think it better to refer your querist to 1 Shep. Touch. (Atherley), 65 to 66**, and 1 Roper's Husband and Wife, 304 *et seq.*, where he will find the subject fully and ably treated upon; and, from the arguments and cases there adduced, will obtain an answer much more conclusive and satisfactory than can be given within the limits of a weekly periodical. M.

2. The post-nuptial settlement made by *A.*, when solvent, of the 10,000*l.* upon his wife and children, although voluntary, is valid against his subsequent creditors, unless indeed it were executed *malâ fide*, or collusively, with a view to defeat them. The stat. 13 Eliz. c. 5, which declares void, as against creditors, all gifts, &c. of real or personal estate, whereby such creditors may be delayed or defrauded, extends only to those who are creditors at the time of the settlement made. 12 Ves. 155. 1 Swanst. 113. 1 Mad. 419. The stat. 27 Eliz. c. 4, merely renders settlements of *real* estate void against subsequent *purchasers*, and does not affect this question. I. B.

QUERIES.

COMMON LAW.

TITHES COMPOSITION.

If a farmer agrees, by parol, with a rector, to pay a composition for his great and small tithes, and no time is specified as to when the tithe year is to end; but the composition is considered due at Michaelmas, and paid then, or perhaps the following Christmas or Candlemas: up to what period would the law consider the payment cleared the farmer against the rector or his successor? K.

TENDER.

May a refusal of money tendered be on a two-fold objection, *viz.* quantity and quality? In other words, may I object because the sum tendered is not the full amount due, but that, if I should fail in proving this, still the money tendered is not *lawful* money? J. A. M.

LAW OF PROPERTY AND CONVEYANCING.

LEASE.—PARTNERSHIP.

If a lease for fifty years be granted to *A. B.* and *C. D.*, copartners in trade, and after the execution thereof, they take *E. F.* in as a partner for twenty-one years, and the stock in trade, lease and premises are valued and taken by them, and they agree to pay the rent of the lease, and a deed of copartnership is executed by them, but no assignment of the lease is made to *E. F.*, who, however, participates in the profits of the trade, and pays his share of the rent, and afterwards a dissolution takes place, and they sign a written agreement to sell all the stock in trade, lease, and premises: Is *E. F.* liable to pay his share of the rent of the said lease, which may become due after such dissolution? and what authorities are there on the point?

X. Y.

LAW OF LANDLORD AND TENANT.

DISTRESS BY EXECUTORS.

Can the executors of a landlord seised in fee, or holding by any other tenure, distrain for rack rent, due at the time of his decease, by virtue of the stat. 32 Hen. 8, c. 37, or any other law? The act appears to be confined literally to tenants in fee, &c. for rents-services, rent-charges, rents-seck, and fee-farms, and not to embrace tenants in fee, &c. of the land, or rack-rents; but seems to have been extended in construction. The authorities not being free from all obscurity, the above query is submitted.

J. A. M.

MISCELLANEA.

COMMISSION TO TRY EARL BOTHWELL.

Mary, by the grace of God, Queen of Scotland,

To our beloved Masters, William Purves, William Lawson, Gawin Ramsey, Messengers, our Sheriffs in that part conjunctly and severally constitute, greeting:

Whereas it has been most humbly remonstrated to us by our beloved and faithful counsellers, Mr. John Spence of Conde, and Robert Crichton of Chos, our advocates, that they are informed that our well-beloved cousin and counsellor Matthew Earl of Lennox, father of our most dear spouse, has asserted, that James Earl Bothwell, Lord Hallis and Creychton, &c. and some others, were the contrivers of the traitorous, cruel, detestable, and abominable murder of his Highness, committed the 9th day of February last past, in the dead of the night, in his Palace, for the time being, in our city of Edinburgh, near the Church in the Fields, wilfully and with premeditated felony, and have declared their suspicion of the said Earl and others, as having committed the said cruel and horrid murder; and having therefore resolved that the truth of it should be tryed, in a course of justice, with all possible diligence and brevity, we have, by advice of the Lords of our Privy Counsel, and also at the humble request and petition of the said Earl Bothwell made to us, and in our presence offering to submit himself to a fair trial of what he is charged with, according to the laws of the land, ordered a court of justice to meet in the Senate-House of Edinburgh on the 12th of April next ensuing, in order to do justice upon the said Earl and others for committing the said cruel and abominable crime and offence, as is more at large set forth in an act inserted in the registers of our said Privy Council. Therefore it is our pleasure, and we enjoin and command you most expressly, that, incontinent these our letters seen, you proceed, and in our name and authority summons the said Matthew Earl of Lennox, at his own house, to appear, together with all others of our subjects, having and pretending to have interest in this cause, by publick proclamation made at the Mercat Crosses of our towns of Edinburgh, Dumbarton, Glasgow, Lanerk, and other places necessary, to the end that they may appear before our judges or their deputies in our Senate-House at Edinburgh, on the said 12th day of April next ensuing, and join with us in the prosecution of this cause, by giving them a summons. And in case that they do not appear, we order that our judges, or their deputies, shall proceed and give sentence the same day, according to the laws and customs of our realm, without any further delay or prolongation; and that you summon every one of them to appear the same day, under the penalty of a fine of 40*l.* sterling, for which they shall answer before us as for their own act and deed. And for this end, we give to every one of you, conjunctly and severally, our full power by these our letters, to the intent that you may deliver and execute them duly, and indorse them to him who shall be the bearer thereof.

Given under our seal at Edinburgh, the 27th day of March, and of our reign the 25th, in the year 1567.

The Legal Observer.

VOL. IV. SATURDAY, SEPTEMBER 22, 1832. No. CI.

> ——— "Quod magis ad nos
> Pertinet, et nescire malum est, agitamus."
> HORAT.

ON A STATUTE OF LIMITATIONS FOR THE RIGHTS OF THE CHURCH, WITH AN ANALYSIS OF 2 & 3 W. 4, c. 100.

THE fourth and not the least interesting subject considered by the Real Property Commissioners, in their Report, is a period of Limitation for the Rights of the Church. They have ascertained the opinions of the heads of the church on the subject, and have come to the conclusion that a Statute of Limitations for these rights would be beneficial. The Commissioners admit that "the property of the church should be held quite as inviolable as that belonging to individuals; but that public interest is concerned in preventing encroachments upon rights which were conferred for the public good." They think it desirable that there should be a settlement between the church and the laity, on the basis of present enjoyments. They consider that the rule "*nullum tempus occurrit ecclesiæ*," while it has worked much vexation and prejudice to the laity, has by no means proportionably enriched the church, and that it has brought upon tithes a reproach which does not necessarily belong to them. They then allude to the rules, now in force, relating to the claims of the clergy, and the doctrine of presumption relating to them, which, being presumptions of fact, are left to a jury to decide; and they point out the unsatisfactory trial that usually takes place on these occasions. They state that there is no other country in which there is not a period fixed for barring the claims of ecclesiastics, and that a Statute of Limitations is now in force which affects the claims of the Crown.

They consider that there are four things to be considered in framing a Statute of Limitation for the Church. 1. The entire *exemption* of land from tithes which, however long it may have taken place, is no ground for the exemption not being set aside. It is proposed to alter this, and to enact that when there has been non-payment of tithes as of right, for a certain number of years, and during a certain number of incumbencies, such non-payment alone shall be sufficient to establish the exemption. 2. *Moduses.* These they consider should be respected as much as the right to tithes itself. They state some of the niceties respecting the law on this subject, and the disputes which often arise relating to it. They propose, that with respect to moduses and exemptions, a reasonable period of actual enjoyment may be safely assumed as the criterion of the rights of the clergy and laity. 3. *Compositions Real.* By the present rule a composition real is not to be presumed from any length of usage consistent with it, but it must be established by proof of the existence at some time of a deed, which must at least be as old as the 13th of Elizabeth. This doctrine, as it militates against the general maxim of the law, they also propose to abolish, and to apply to compositions real the same enactment which they wish to introduce relating to moduses. 4. *Glebe Lands.* These they propose also to include in the statute, and to declare that a period of sixty years, and two incumbencies, with

three years of a third incumbency, shall be sufficient to establish exemptions from tithes, moduses, compositions real, and rights to glebe lands.

The Commissioners conclude their Report by stating, that they had intended to have included the subject of Wills, and the administration of the personal estate of persons dying intestate; but that they have been induced to delay it on account of the appearance of the Report of the Ecclesiastical Commissioners, which we have already laid before our readers.

We mentioned that the Commissioners had circulated a list of queries on this subject among the heads of the church. We shall now state some of their answers. The question asked was, whether a Statute of Limitations could be framed to relate to the rights of the church, and the subjects which we have mentioned.

The Archbishop of Canterbury says,

"On a subject so materially affecting the interests of the clergy at large, I could not give an opinion without incurring a responsibility which I am not willing to take on myself, more especially without information sufficient to give me confidence in my own judgment. I shall be most willing to take into consideration any plan which shall be recommended by the high authorities of the law. At present I will only observe, that if the public convenience should require the sacrifice of a privilege which I conceive to have been not less useful to the church, in preventing encroachments on her property, than in recovering her rights and possessions when they had improperly passed into other hands, some method ought to be found for the previous settlement of all contested claims of exemption or *modus*, and for placing the property now possessed by the church on such a footing as to preclude its alienation, except in such cases as are authorised by law, for the future."

The Bishop of London's opinion is as follows:

"It is impossible to give an answer to so general a question. Each case must be looked at by itself. The principles upon which the statutes of limitation are grounded are not strictly applicable to the case of tithes, where there is a fresh account every year between the incumbent and the tithe-payer; so that the only limitation which should be allowed would be, that an incumbent should be estopped from recovering unclaimed tithes for more than a certain number of years.

"The question of a *right* to tithes is not a fit subject for a statute of limitation.

"*Moduses* ought not to be settled by a statute of limitation. The whole question of *moduses* should be settled in a different way, before such a statute can be admitted.

"If the *onus probandi* be taken off the tithe payer, it will be a very great hardship on the clergy, inasmuch as it will be a virtual denial of their common law right to tithes."

The Bishop of Worcester says,

"Perhaps there may not be any insuperable objection to the enactment of a statute of limitations to ecclesiastical property, and for tithes in lay hands.

"Fifty years is sufficient, a *hundred* not too many.

"The *onus probandi* should lie on the person claiming the *modus* or exemption for the whole period of 100 years."

The Bishop of Peterborough gives the fullest answer.

"If therefore fifty years are suffered to elapse, without demanding more than a certain fixed payment, we may reasonably infer that such family is not *entitled* to more. But no such inference can be drawn from the lapse of fifty or even one hundred years, when the tithes belong to a clergyman, who has only a life interest in them, and perhaps a very short one; for clergymen are often presented to livings when they are advanced in years. If such a person engages in a law-suit respecting a *modus*, he may incur the whole expense, and leave the benefits to be enjoyed by a successor who is a perfect stranger to him. On the other hand if he fails, he may reduce both himself and his family to utter ruin. For he must expect to be opposed by the most powerful and the most wealthy persons in the parish; whereas no such opposition can be made, when the tithes are in lay hands, because the power and wealth of the parish is then generally centered in the titheholder himself. If, therefore, an incumbent or incumbents should, during a period of five years, be deterred from incurring a certain expense for an uncertain result, a result which, even if successful, may be of no advantage to themselves, it would be unjust to make the forbearance of those, who had either no means or no inducement to prosecute their claims, a bar to a successor who is in possession of both."

The Bishop of Carlisle is strongly in favour of a statute of this kind.

"So far from there being an insuperable objection to such a measure, I think it in every point of view desirable.

"I should think three incumbencies, AND a period of sixty years, would meet the object in view.

"I would propose sixty, instead of fifty years, as a proper period, and three incumbencies; sixty years being fixed as the period by 9 Geo. 3. c. 16, as a bar even to the prerogative of the crown; and as the king and the church, previous to this statute, were on the same footing, I would now urge that

as a reason why, in any alteration, the same term of years should be fixed on."

We can only say, in conclusion, that we approve of almost all of the changes proposed in the law by the present report. They are evidently made after a full and candid investigation of the several subjects: they make no general or sweeping changes; and we trust that when they are embodied into bills, they may be more speedy in becoming the law of the land than the other measures of the learned Commissioners.

Whilst we are on this subject, it is proper to mention that an act was passed in the last session of parliament, in which some of the recommendations of the learned Commissioners have been carried into effect, although, we believe, not in consequence of their report. We mean the 2 & 3 W. 4, c. 100, the provisons of which we shall here abridge.

Section 1 enacts, That all prescriptions and claims of or for any *modus decimandi*, or of or to any exemption from or discharge of tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by our said lord the King, his heirs or successors, or by any Duke of Cornwall, or by any lay person, not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained and be deemed good and valid in law, upon evidence showing, in cases of claim of a *modus decimandi*, the payment or render of such *modus*, and in cases of claim to exemption or discharge, showing the enjoyment of the land, without payment or render of tithes, money, or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless, in the case of claim of a *modus decimandi*, the actual payment or render of tithes in kind, or of money or other thing differing in amount, quality, or quantity from the *modus* claimed, or in case of claim to exemption or discharge, the render or payment of tithes, or of money or other matter in lieu thereof, shall be shown to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of *modus* was made, or enjoyment had, by some consent or agreement expressly made or given for that purpose by deed or writing; and if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of *modus* was made or enjoyment had by some consent or agreement expressly made or given for that purpose by deed or writing; and where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, person, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible, upon evidence showing such payment or render of *modus* made or enjoyment had, as is herein-before mentioned, applicable to the nature of the claim, for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: provided always, that if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to show such payment or render of *modus* made or enjoyment had (as the case may be), not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the full period of sixty years, and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of *modus* was made, or enjoyment had, by some consent or agreement expressly made or given for that purpose by deed or writing.

2. That every composition for tithes which hath been made or confirmed by the decree of any Court of Equity in England in a suit to which the ordinary, patron, and incumbent were parties, and which hath not since been set aside, abandoned, or departed from, shall be and the same is hereby confined and made valid in law; and that no *modus*, exemption, or discharge shall be deemed to be within the provisions of this act, unless such *modus*, exemption, or discharge shall be proved to have existed and been acted upon at the time of or within one year next before the passing of this act.

3. Provided always, that this act shall not be prejudicial or available to or for any plaintiff or defendant in any suit or action relative to any of the matters before mentioned, now commenced, or which may be hereafter commenced, during the present session of Parliament, or within one year from the end thereof.

4. That this act shall not extend or be applicable to any case where the tithes of any lands, tenements, or hereditaments shall have been demised by deed for any term of life or number of years, or where any composition for tithes shall have been made by deed or writing by the person or body corporate entitled to such tithes, with the owner or occupier of the land, for any such term or number of years, and such demise or composition shall be subsisting at the time of the passing of this act, and where any action or suit shall be instituted for the recovery or enforcing the payment of tithes in kind within three years next after the expiration, surrender, or determination of such demise or composition.

5. That where any lands or tenements shall have been or shall be held or occupied by any rector, vicar, or other person entitled

to the tithes thereof, or by any lessee of any such rector, vicar, or other person, or by any person compounding for tithes with any such rector, vicar, or other person, or by any tenant of any such rector, vicar, or other person, or of any such lessee or compounder, whereby the right to the tithes of such lands or tenements may have been or may be during any time in the occupier thereof, or in the person entitled to the rent thereof, the whole of every such time and times shall be excluded in the computation of the several periods of time herein-before mentioned.

6. That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, *non compos mentis*, feme covert, or lay tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods herein-before mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

7. That in all actions and suits to be commenced after this act shall take effect, it shall be sufficient to allege that the *modus* or exemption or discharge claimed was actually exercised and enjoyed for such of the periods mentioned in this act as may be applicable to the case; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, deed, or writing herein mentioned, or any other matter of fact or of law not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of the matter claimed.

8. That in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim.

9. That this act shall not extend to Scotland or Ireland.

PRACTICAL POINTS OF GENERAL INTEREST.

No. XXXI.

EXAMINATION OF WITNESSES BY INTERROGATORIES.

By the 13 G. 3. c. 63. § 45, certain powers were given for the examination of witnesses in India; by the 1 W. 4. c. 22, these powers are extended to all other colonies, and to all actions, as well those where a cause of action arose in India as elsewhere; and by § 4. the Courts of Westminster, Lancaster, and Durham, may order the examination of witnesses, within their jurisdiction, by an officer of the court.

Under this section, *Wilde*, Serjeant, had obtained a rule *nisi* for the examination of a female witness by the prothonotary, on an affidavit that she was pregnant, expected shortly to be delivered, and would be unable to attend the trial of the cause in the months of February and March. The affidavit, however, not disclosing the precise time at which she expected to be delivered, *Bompas*, Serjeant, who shewed cause, objected to it as insufficient. The Court, without laying down any general rule, but expressing some doubt whether this was a case contemplated by the late act, thought that, at all events, the affidavit was insufficient. It ought to have been deposed by competent persons, that there was a fair ground for believing that the delivery would take place before the time of trial, or so near as to render the attendance of the witness perilous. *Abraham* v. *Newton*, 8 Bing. 274.

LEGAL BIOGRAPHY.

No. II.

SIR JAMES MACKINTOSH.

(*Continued from p.* 308.)

Mr. Mackintosh continued at the bar till 1803. His celebrated speech on the trial of Peltier for a libel against Napoleon Buonaparte, was delivered on the 21st February, in that year. It is memorable for its advocacy of a free press. He brought to bear on the question a great force of historical illustration and philosophical reflection, embellished with much oratorical diction. Lord Ellenborough pronounced it "the most eloquent oration he had ever heard in Westminster Hall."

On the 21st Dec. of the same year he was promoted to the office of Recorder of Bombay. Undoubtedly, he possessed from nature many eminent qualifications as a Judge, and he prepared himself with extraordinary labour for the peculiar duties of his station. He had to study a people exceedingly dissimilar from all he had ever seen, in manners, habits, laws, and notions of morality. Mr. Campbell has given, in the Metropolitan Magazine, the following interesting account of his judicial career:

"In his first address to the jury of Bombay, he said, that it had been one of his chief employments to collect every information about the character and morality of the people that were to be entrusted to his care, and about

the degree and kinds of vice that were prevalent in their community. He compared himself in this preliminary occupation to a physician appointed in an hospital, who would first examine the books of the establishment, in order to make himself acquainted with the complaints that were most frequently to call for cure. 'To his deep regret, he found the most besetting sin of the native East Indians was that of perjury. More apposite remarks on the subject could scarcely be made than those which I shall quote from his speech on this occasion. 'The prevalence of perjury,' he said, 'is, perhaps, a more certain sign of the dissolution of moral principle than other more daring and ferocious crimes, more terrible to the imagination, and of which the immediate consequences are more destructive to society. Perjury indicates the absence of all the common restraints which withhold men from crimes. It supposes the absence of all fear of human justice, and bids defiance also to all human laws; it supposes also either a contempt for public opinion, or, what is worse, a state of society which has ceased to brand with disgrace actions that ought to be infamous; *it is an attack on religion and law in the very point of their union.*'"

He then proceeds to give some instances which peculiarly illustrate the character of Sir James.

"A native woman had been fully convicted of being guilty of wilful and corrupt perjury, while giving evidence on a trial of two individuals for murder, her testimony having been totally different from that which she had originally given before the coroner. During her examination as a witness, Sir James asked her whether she thought there was any harm in false swearing. She answered that she understood the English had a great horror of it, but that there was no such horror in her country. The reason of her silence as to the murder, (in which she was probably the principal agent) she said was, that in her country, Ahmedebad, a fine of five rupees was imposed upon any one who spoke of a murder. Here then we have a striking instance of the effect of laws upon the manners of a people; the very law holding murder in such abhorrence, as not to allow the mention of the crime, rendered its accomplishment more easy. Sir James sentenced this woman to five years' imprisonment, during which period she had to stand once a year in the pillory, in front of the court-house, with labels on her breast and back, explanatory of the crime of which she had been guilty, and of the resolution of the Court to adopt the most rigorous means for the extirpation of this offence.

"One of his most eloquent addresses was made on the trial of two young (native) officers, who were convicted of having conspired to waylay and assault by night, two Dutchmen, from Cochin, under very aggravated circumstances. There was no doubt of the culprits having designed the commission of murder, but their design had been apparently formed under the influence of intoxication; and it seems liable to suspicion, that they were both of them desperadoes, in whose temperament there was some admixture of insanity. Whatever might be the grounds of his lenity, Sir James was determined that they ought not to be put to death—though I infer from connected circumstances, that he took care that after their punishment of incarceration, they should not be let loose on society without some watch being placed over them, or some one being made their surety. The benevolence of his unwillingness to spill their blood, will not be lessened in our consideration, when we learn, that he had himself very nearly fallen a victim to those ruffians. Expecting to be called up to receive sentence of death, they had got knives, and were resolved to sacrifice their sentencer. Most fortunately their design was discovered, but the discovery made no alteration in Sir James's conduct towards them. 'It has been my fate,' he said, 'in this place, to be obliged to justify the lenity rather than the severity of the penalties inflicted here. I think it is likely to continue so—for I have more confidence in the certainty than in the severity of punishment. I conceive it to be the first duty of a criminal judge to exert and to strain every faculty of his mind to discover in every case the smallest possible quantity of punishment that may be effectual for the ends of amendment and example; I consider every pang of the criminal, not necessary for these objects, as a crime in the judge. I was employed, (he said) addressing himself to the culprits, in condering the mildest judgment which public duty would allow me to pronounce on you, when I learned from undoubted authority, that your thoughts towards me were not of the same nature. I was credibly, or rather certainly informed, that you had admitted into your minds the desperate project of destroying your own lives at the bar where you stand, and of signalizing your suicide by the previous destruction of at least one of your judges. If that murderous project had been executed, I should have been the first British magistrate who ever stained with his blood the bench on which he sat to administer justice. But I could never have died better than in the discharge of my duty. When I accepted the office of a minister of justice, I knew that I ought to despise unpopularity, and slander, and even death itself. Thank God, I do despise them, and I solemnly assure you, that I feel more compassion for the gloomy and desperate state of mind which could harbour such projects, than resentment for that part of them which was directed against myself. I should consider myself as indelibly disgraced, if a thought of your projects against me were to influence my judgment.' After a most impressive admonition to return to a better state, he pronounced judgment upon them, to be imprisoned for twelve months."

We conclude this portion of our sketch with Mr. Hazlitt's remarks on the appointment of Sir James to a Judgeship in India.

which, he considers, was entirely foreign to his feelings and habits, however favorable it might have been to his pecuniary interests.

"He was out of his element among black slaves, and sepoys, and nabobs, and cadets, and writers to India. He had no one to exchange ideas with. The "unbought grace of life," the charm of literary conversation, was gone. It was the habit of his mind, his ruling passion, to enter into the shock and conflict of opinions on philosophical, political, and critical questions—not to dictate to raw tyros, or domineer over persons in subordinate situations—but to obtain the guerdon and the laurels of superior sense and information, by meeting men of equal standing, to have a fair field pitched, to argue, to distinguish, to reply, to hunt down the game of intellect with eagerness and skill, to purchase advantage, to cover a retreat, to give and take a fall—

"And gladly would he learn, and gladly teach."

[*To be continued.*]

DISPUTED DECISIONS.

No. XI.

PRACTICE.

Hyde v. *Gardner*, p. 268, *antè*.

On discharging the rule in this case for setting aside the notice of declaration, on the ground that the notice was "trespass on the case," and the declaration in "trespass," and therefore irregular, Mr. Justice Taunton no doubt evinced a very laudable desire to discountenance what may be considered "sharp practice;" but many who would applaud such a desire, would not, I think, agree that his Lordship gave an adequate reason for discharging the rule.

N. Clarke, who shewed cause, was certainly incorrect in saying that the case of *Gilbert* v. *Kirkland*, 1 Dowl. Prac. Rep. 153, was "*extremely similar to the present*:"—it is easy to point out the dissimilarity. There the irregularity complained of was, that "the declaration was filed *conditionally*, *after* the time for the defendant's appearance had expired," and Mr. Justice *Parke* held that, by taking the declaration out of the office, the irregularity was waived; "because the defendant," on applying at the office, "has an opportunity of seeing the exterior of the declaration, and could have seen by the *indorsement*, that the declaration was filed conditionally." Now, the defendant Gardner could not have ascertained the variance which constituted the irregularity in his case, by seeing the exterior of and indorsement upon the declaration; because we know the indorsement gives no intimation as to the *nature of the action*.—Mr. Justice *Parke's* decision was therefore no authority in the present case. Perhaps, indeed, it is itself objectionable, because, though usual, I believe it is *not necessary* to indorse *any* notice on the declaration; and if so, it would be scarcely correct, judicially, to rely upon the defendant's having an opportunity of learning any thing from a *presumed* indorsement. Mr. Archbold, in his Practice, (vol. 1, ed. 1819, p. 106,) observes, "the indorsement is *not essential* when the declaration is filed, for the notice of filing it is also a notice to plead." And again, p. 111:—"Notice to plead is *usually* indorsed on the declaration, but may be given on a *separate* paper, and served *subsequently to the declaration*." On discharging the rule in *Hyde* v. *Gardner*, Mr. Justice Taunton thus expressed himself:—"I have enquired," said his Lordship, "as to the practice of the office, and I find, that though *it is not a matter of right to see the declaration*, yet if the defendant asks the nature of the action, the information is never refused; and as he might have had the information, the taking it out was a waiver of the irregularity."

His Lordship, then, grounds his decision on the courtesy of the clerk of the declarations. I believe the profession would very generally bear honourable testimony as to the civility of the present officer; but founding the practice of a court of justice on the courtesy of an individual, reminds me of Selden's remark, that "Equity was according to the conscience of him that was Chancellor." From his Lordship's decision, I should expect it will become a matter of course in all cases, to ask for information as to the nature of the action, and other questions, from the answer to which a variance might possibly be detected. Strict practitioners will certainly make every enquiry, rather than possibly waive an irregularity; unless, by the bye, it should occur to them, that they could make no use of the information, if given, which I think would be the case; for, supposing in the case under consideration, enquiry had been made, instead of taking the declaration out of the office:—in the first place, the information received might be incorrect, or, if correct, the party applying might have misunderstood the answer to his question; and there would be nothing astonishing in either case, particularly in the bustle of commencing or concluding a term. But assuming the information were correct in itself, and correctly understood, and relying upon it, the party goes into Court to establish a variance; what variance could he prove? Why, merely a variance between the *information given to him by the Clerk of the Declarations, and the notice* of the declaration served upon him. What could the Court have done under such circumstances? How could they have concluded the plaintiff? To have set aside his proceedings, on such evidence, would have been a contravention of the rule of law, which requires that the Court should decide on the best evidence the nature of the case will admit of; for that is a universal rule, and con-

sequently must apply to all proceedings before the Court, whether interlocutory or not; and clearly, the information of the Clerk of the Declarations, as to the contents of a declaration, is inferior evidence to that of the document itself.

Having thus, as I humbly submit, shewn that Mr. Justice *Taunton's* reason for discharging the rule is unsatisfactory, I would take the liberty to suggest the true principle on which I conceive such was its *proper* fate; and it is this:—there was, in fact, no substantial or material variance between the declaration and the notice;—nothing that could *mislead* the defendant. The practical and essential import of the notice was, to apprise the defendant that a declaration was filed against him; by whom; in what Court; and the time allowed him to plead; and for all information as to the particular species of action, he must necessarily refer to the declaration itself. It has been decided that a notice of declaration need not state the damages laid, *Hetherington* v. *Hobson*, 6 Taunt. 331; and where the declaration filed in the office before the defendant's appearance, was indorsed "filed conditionally," notice of declaration *generally*, was held regular; *Cort* v. *Jacques*, 3 T. R. 77; *Watkins* v. *Worley*, 8 Taunt. 644; upon the same principle, describing the action in the notice of declaration to be "trespass on the case," instead of "trespass," is, I contend, merely surplusage. No precise information, on which the defendant can act, is conveyed by the three additional words:—they merely mention a genus, of which there are an immense variety of species; for "trespass on the case" may be committed by means almost infinitely various. The words could not mislead; for though true it is, that the language of the plea of general issue varies in trespass, and trespass on the case, yet by the rules of law a defendant is not allowed, if he would be foolish enough, to frame his plea without looking at the declaration, or in other words, taking it out of the office; for if he did plead without paying for the declaration, his plea might be treated as a nullity; Arch. p. 122.

These premises, I submit, irresistibly bring us to the conclusion, that if there were in point of law an irregularity, as decided by Mr. Justice *Taunton*, the defendant did not waive it by taking the declaration out of the office. His Lordship admitted that the defendant had no right to see the declaration, unless he would take it out, nor had he any right to demand from the clerk of the declarations information as to the nature of the action. We have seen that the question of waiver cannot, on principle, depend on the courtesy of the clerk, and we have also observed that the defendant could get no information from the notice of declaration, as to the precise nature of the cause of action declared upon, which would enable him to prepare his plea, or which he could act upon in any way whatsoever; and that if he chose to rely upon the contents of the notice, and prepare his plea accordingly, he would not be permitted to file or deliver it without first obtaining the declaration; whereas by that very act, should there be any irregularity in the notice of declaration, it would, according to Mr. Justice Taunton's decision, be waived. I contend, however, according to other decisions, such a step could not be deemed a waiver of the irregularity in the notice of declaration. The motion to set aside proceedings for irregularity, must be made the first opportunity after the irregularity has taken place, and before any further proceedings have been had in the cause by the party complaining of it; 3 T. R. 7, 10; 2 Taunt. 243; (and other cases cited by Archbold). Thus an irregularity in the affidavit to hold to bail, must be taken advantage of before bail has been perfected, or even put in, and before plea, or judgment by default, and notice of executing a writ of inquiry:—in process, before appearance, or before the declaration has been taken out of the office; Arch. vol. 2, 201. Now I suspect some confusion exists on the subject of waiver, by concluding that because a party waives an irregularity in the *process* by appearing, *or by taking the declaration out of the office*, an irregularity in the *notice of declaration* is also waived by taking the declaration out. But it will be observed that such a conclusion is unwarranted. The irregularity must be complained of before any further proceedings have been taken by the party complaining. By appearing, therefore, to an irregular process, the irregularity is waived; but I contend, that simply taking a declaration out of the office is not a further proceeding in the cause, within the meaning of the above quotation from Archbold. Filing a declaration is, in fact, only a circuitous or substituted mode of effecting its delivery to the defendant, for whose use it is deposited in the office. Of necessity, the variance between the notice and the declaration could only be discovered by comparing the two documents with each other; and Archbold quotes 1 B. & P. 342, as an authority, that to set aside the proceedings for irregularity in the notice of declaration, the application must be made *before plea*. And from 2 Str. 1072, we find that by taking the declaration out of the office, you waive all objection to the *process*, which plainly imports that you *do not* waive any irregularity in the notice of declaration. By the process itself, which you have in your own possession, you may discover any irregularity *in it*, but you cannot detect a discrepancy between the notice and the declaration, without having the latter to consult. In the case under consideration the defendant by that means discovered, and before pleading, complained of, the variance; and I therefore submit that he did not waive the irregularity (if it were one), and that such is the doctrine of all the authorities prior to the decisions of Mr. Justice *Parke*, and Mr. Justice *Taunton*.

T. P.

SALARIES OF THE JUDGES.

[*Concluded from p.* 315.]

COMMON PLEAS.

THE salary of the Lord *Chief Justice* of the Court of Common Pleas is fixed by the statute 6 G. 4. c. 83, at the sum of 8,000*l.* per annum; by which statute the power of disposal of the several offices in the Court, which had from the earliest time belonged to the Chief Justice, is taken away, and a provision is made for the performance of the duty of each office, as it becomes vacant, by the principal only, at a salary to be allowed by the Chief Justice and the Lords Commissioners of His Majesty's treasury, out of the fees and emoluments of such office; the residue thereof to be paid by the officer into His Majesty's treasury, so as to form a fund for the salary of the Lord Chief Justice.

This provision has been called into action since the appointment of the present Chief Justice by the falling in of two of the offices of the Court.

No fees are accounted for to the Chief Justice of the Court of Common Pleas, nor ever were, by the marshal or the associate; but the marshal and the associate receive certain ancient fees, on the entry and trial of causes at the Sittings for London and Westminster, varying in amount every year; but in the last year amounting in the case of each of these offices, to a sum between 800*l.* and 900*l.*

No fees have been accounted for to the Chief Justice of the Court of Common Pleas, either by the clerks or any other officers of the Court, since the passing of the 6 G. 4. c. 83; but all such fees as were formerly accounted for to him, have been ever since paid into the Treasury at the end of each term, and accounted for upon oath.

But there is a small fee received by the clerks of the Judge, upon the trial of every cause upon the circuit, and accounted for to the Judge who tries the cause. The amount of these fees is, upon the average, 30*l.* for each circuit, and the clerk usually places it in diminution of the expenses of each circuit, which on an average amount to 300*l.*

Mr. Justice *Park* has made the following return:—

"Salary of Mr. Justice Park, regulated by the statute of 6 G. 4. c. 84,—5,500*l.*

"Besides the above salary, the Judges themselves, and no officer on their account, receive any fees whatever, in *respect of the execution of their offices, either in their respective Courts in Westminster Hall, or at their respective chambers, in respect of any business depending in their Court*, pursuant to the express provision of the 6th section of the said statute, 6 G. 4. c. 84; but by the provision of the same section, the *fees* formerly received in chambers, and accustomed to be received for *the use of the Judges*, are still required to be received by the officers of the Judges *for the public use*; and my officers inform me that fees so paid from my chambers alone to Government amount, upon an average, to nearly 500*l.* per annum, and which, of course, are applied in part discharge of my salary.

"The expenses incident to my station *as a Judge*, and defrayed by myself, are as follows:—

	£.	s.	d.
Last Summer circuit (Oxford), out of pocket - - -	312	16	0
Spring, Western (1832), out of pocket - - - - -	346	12	6
Annual expenses for chambers in Serjeant's Inn, merely for the discharge of judicial duty -	45	0	0
	£704	8	6

"The above sum is expended by me, *exclusive* of about 50*l.*, received on the two last circuits, as ancient fees received upon the entry of causes at the assizes, and which, of course, vary according to the circuit, and the number of causes, and which have nothing to do with the 6th section of the above statute."

The return as to officers and clerks resembles the returns in the King's Bench.

Mr. Justice *Gaselee.*

	£.	s.	d.
Annual salary, by act of parliament - - - - - -	5,500	0	0
From which are to be deducted the expenses of the two circuits, which vary according to the respective circuits.			
The expenses of my two last, *viz.* the Home, in the Summer of 1831, and the Western, in the last Spring, after deducting the moiety of the amount received by the officers for the Judges, for the entry of causes, traverses, and glove money, and applied in diminution of the circuit expenses, amounted to the sum of - - - -	600	2	11
	£4,899	17	1

Once in about six or seven years the expenses of a Winter circuit are also to be deducted.

Mr. Justice *Alderson.*—Salary 5,000*l.*

The annual expense of the circuits, after deducting 30*l.* received for fees, amounts to about 700*l.* or 750*l.*, and in the last year, including the Winter circuit, about 950*l.*

Mr. Justice *Bosanquet.*

	£.	s.	d.
Salary - - - - - -	5,500	0	0
Fees received on account of the Judge by the crier on the circuit, for entry of causes and glove money, and appropriated by him towards the expenses of the circuit, amounting in the last year to - - -	41	0	0

James Pulleine, Esq., marshal, fees and emoluments - -	186	16	0
Samuel Gibbs, clerk in London and crier on the circuit, fees and emoluments - - -	432	7	7
John Bishop, clerk in London, fees - - - - - -	238	14	6

EXCHEQUER.

The salary of the Lord *Chief Baron* is fixed by act of parliament at 7,000*l.* a-year. He has no fees or other emoluments.

The associate, the marshal, the clerks who attend at chambers, and the other officers of the Court of Exchequer, are paid for their services, some by salaries and others by fees, no part of which is accounted for to the Lord Chief Baron.

On the circuit, the associate, the marshal, the clerks and other officers, are also paid for their services by fees, of which the marshal only accounts for a part of the fees received on the entry of causes, which amounts on an average of each circuit to about 30*l.*, and is applied towards the expenses of the table of the inferior officers of the circuit.

Mr. Baron *Bayley's* salary as a Judge of the Court of Exchequer is 5,500*l.* a-year; out of which he has to pay the expenses of circuit and chambers, which amount, *communibus annis*, to about 600*l.*

The clerks who attend at chambers have no salaries, but are paid wholly by fees for the business they do. They keep for their own use all they receive. Their emoluments last year, from the end of Easter term 1831, to the end of Easter term 1832, including the circuit, was to each of two clerks 444*l.* 0*s.* 9*d.*

The marshal's receipts for the last circuit, for his own use, were 141*l.*

Mr. Baron *Vaughan*.—Amount of salary, as settled by act of parliament, 5,500*l.*

Average of six years' circuit expenses, including one Winter circuit, and the expenses of chambers, about 800*l.* per annum, after every deduction.

Mr. Baron *Bolland*.—The amount of salary, as fixed by the act of the 6th of G. 4. c. 84. § 2, is 5,500*l.*

Since November 1829, including one Winter, one Oxford, one Western, and three Welsh circuits, the expenses have been 1,850*l.*

Mr. Baron *Gurney's* salary is 5,000*l.* per annum, subject to the expenses of circuit and chambers. Spring circuit expenses, after diminution by fees, 298*l.*; Oxford circuit, 350*l.*; Winter Home circuit will probably be about 250*l.*

LAWS OF FRANCE.

ARBITRATION.

It is observed by Mr. Okey in his Digest, that from the circumstance of the French Courts, whether from absence of proper jurisdiction or other cause, declining to interfere between foreigners, excepting in commercial cases and misdemeanors, and any decision consequent to the submission which foreigners may make to them being rather in the nature of an award than of a judgment, it would seem that the differences arising between British subjects might be at least as well, if not better, adjusted by an arbitrator or arbitrators whom they might themselves appoint, and whose decision, for the reasons above stated, would be equally conclusive, governed by the laws of their own country, and attended with much less delay and expense.

The law of arbitration in England need not here be stated; but it may be useful to notice, that arbitration is much favoured by the law of France. In commercial disputes it is frequently even made imperative upon the parties; it much resembles the same proceeding in England.

The submission may be by *procès verbal*, before the arbitrators appointed, by a deed before a notary, or by private signature. It must set out the cause of difference, the names of the arbitrators, who, although otherwise bound to decide according to strict rules of law, may, by a power given to them by the parties by whom they are nominated, decide according to the equity of the case.

When two arbitrators cannot agree, an umpire is appointed by the president of the tribunal which is to decree the performance of the award; the umpire must decide within a month from his appointment, which decision is grounded upon consultations with the arbitrators.

The award is open to appeal, unless it has been otherwise agreed between the parties.

Performance of the award is enforced by an order of the president of the *Tribunal de Première Instance*, within the jurisdiction of which it has been made: to this effect a draft of the award is deposited within three days after it is made, by one of the arbitrators, with the registrar of the tribunal. If it be a case arising out of an appeal, the award is then deposited with the registrar of the *Cour Royale*.

The cognizance of the due performance of the award belongs to the Court which has made the order respecting it.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

INJUNCTION.

A special injunction to restrain an alleged infringement of a patent, is continued until after trial of an issue at law to determine the right—the plaintiff undertaking to try such issue with all possible speed; notwithstanding that the defendant in his answer, and by affidavits, denies that he was guilty of any infringement of plaintiff's patent,

and alleges that he sustains great injury by the continuance of the injunction.

The *Solicitor-General*, Mr. *Knight*, and Mr. *Duckworth*, were heard for a great part of two days, in support of a motion to discharge an injunction, obtained upon an *ex parte* application, to restrain the defendant from "making or causing to be made, or from selling any machine in the bill mentioned, or any other machine to spin stuffs, cottons, or other such substances, wherein were employed the parts of the plaintiff's mechanism." A more sweeping injunction, or one from the perils of which it was more difficult to escape, never came before his lordship's bar. Their first point was, that the plaintiff had fallen into an error of fact in stating that the defendant had obtained a private inspection of his machine, and had made a fraudulent use of it. The defendant had never made any such use of it, and it was out of his power to do so. The machine in question is a spinning machine, called a *mule*, and such *mules* were very numerous, and were distinguished from one another as the members of one family. The plaintiff's patent embraced the *Billy*, the *Jenny*, the *Jack*, and other members; and he would shew, that the defendants' did not come in contact with either the *Billy*, the *Jenny*, or the *Jack*. Of late years, there had been many patents granted on subjects of machinery, but very few on new principles; most of them being for improvements on the original inventions of others. The present machine, in the first instance, was called a *mule*, and was, at first, worked with great human labour; but a patent was subsequently obtained by a person of the name of Deiongh, for the application of steam. Mr. Roberts (the plaintiff) obtained a patent for a still further improvement on this last improvement of Deiongh's, so that he was as much subject to an injunction on Deiongh's, as Knowles (the defendant) was on his. What they meant to contest was, that the machine used by their client was no infringement on the plaintiff's patent rights. Both machines, though they produced the same result, were essentially different, both as to make and manner of working. The constituent parts of neither of them were new; it was in the peculiar and new combination of those parts, and their application to particular purposes, of which the patent consisted. In the plaintiff's machine there was a *drum* and *chord*. In the defendant's, there was the same *drum* and *chord*; but in one machine they are *fixed*, and in the other *moveable*. In the plaintiff's machine, again, the variable motion, which it was the grand object of both parties to obtain, and for which both had obtained their patents, was produced by a *radical* arm, affixed to the side of the machine, where, as in the defendant's, the valuable motion was produced by a *fusee*, and by a *diagonal* bar, running under the carriage. The only question was, whether, in point of fact, the mode by which the defendant had obtained this variable motion, was the same as that by which the plaintiff produced the same result; and if so, whether the plaintiff had a right to restrain the defendant from the exercise of his machine.

The affidavits of practical men, skilled in mechanics, and in cotton spinning, were read, to shew those material differences between the two machines.

Sir *Edward Sugden*, in support of the injunction, said, that the defendant's having obtained a patent for his machine as an invention, proved nothing in support of his case, as nothing was more easy than to obtain a subsequent patent, unless the original patentee was constantly on his guard with a *caveat*. He read affidavits to shew that the plaintiff's machine was new, and that the defendant's was a copy thereof. Dr. Birkbeck, in his affidavit, stated, that "the two machines were exactly the same; and that the defendant's seemed to be copied from the plaintiff's." The plaintiff's was as valid a patent as was ever granted; and he was clearly entitled to the continuance of the injunction, unless his lordship should be of opinion, that an issue should be tried in a court of law. The plaintiff was perfectly prepared for the trial at law; but nothing could be more injurious than to allow the defendant to make or sell any of his machines, pending the trial. If the injunction were now dissolved, the defendant would just have time, before the trial, to make a large number of these machines, and would then say, that the Court had deceived him into making them, and complain of hardship if the Court should refuse to allow him to sell the stock on hand, at least. The best way to prevent all such complaints would be, to continue the injunction till after the trial at law, if his lordship should direct such trial.

The *Lord Chancellor* gave judgment on a subsequent day. He said, that this was a motion to dissolve an injunction, granted *ex parte*, upon an allegation that the plaintiff was the patentee of an improvement in self-acting spinning machines, and that the patent right had been infringed by the defendant, who had adapted the invention to machines of his own manufacture. The doubts which he at first entertained upon the plaintiff's right, had become considerably lessened in the course of the arguments in Court, and the attention which he had since bestowed on the case. Although he should not dissolve the injunction, he was still of opinion, that the plaintiff ought to establish his right by a trial at law, which were the only means by which it could be satisfactorily enquired into. It was desirable that the trial should take place as soon as posble; and, if the defendant would be ready to proceed, and required it, he would direct it to be had at the ensuing assizes at Lancaster. The plaintiff, no doubt, was prepared; but if the defendant required further time to prepare his evidence, he would allow him time, upon giving the plaintiff a week's notice to postpone the trial.

The *Solicitor-General* said, he thought it would be impossible for the defendant to be prepared for the trial by the next assizes,

though anxious to get the matter decided as soon as possible.

His Lordship said, that the trial had then better take place in London, and more particularly as a great part of the evidence would consist of the depositions of scientific men, who were resident in London. He therefore directed an issue to be tried at common law, in Middlesex, and to be brought on as speedily as possible. *Roberts* v. *Knowles*. Sittings in Lincoln's Inn after Trinity Term. L. C.

VICE CHANCELLOR'S COURT.

FRIENDLY SOCIETY. — DISTRIBUTION OF FUNDS.

The funds of a Friendly Society are at the disposal of the majority of the members, notwithstanding a reasonable apprehension on the part of the minority, that the intention is to distribute the funds and dissolve the society, to the injury of the old members.

Mr. *Lloyd* applied, on behalf of the members of "the Barnstable Friendly Union Society," for an order to compel the trustees of the society to deliver in their accounts, and to pay into the hands of the persons appointed by the members, the monies in their possession belonging to the society. This society was formed in the year 1796, after, and in conformity with the act of the 23d of George 3d, for the encouragement of such societies, and their funds had been progressively increasing up to the present time. In 1830, at the annual dinner, one of the stewards, of the name of Richards, called upon the trustees to shew their accounts, which they refused, and also refused to give up the money, allowing Wilkinson, one of the three trustees, to retain 400*l.* of it on an insufficient security. The society subsequently appointed new trustees, one of whom was Richards, and by a majority of fifty to two, again called on the old trustees to give in their accounts. They refused to do so, alleging, that many new members had got into the society, and that they, at the instigation of Richards, who was himself a new member, were anxious to get hold of the funds of the society, in order to divide them, and thus defraud the old members. This allegation Richards, in his affidavit, entirely denied. He stated, that he himself had been a member since 1823, and that he did not contemplate any division of the funds, nor did any of the other members to his knowledge. But even if they did, they were justified in doing so, as the act for the encouragement of those societies expressly empowers a majority to divide the funds. The trustees, who were no longer the officers of the society, refused, nevertheless, to give up to the society those funds, of which they had been appointed the temporary guardians; and he hoped his Honor would see the necessity of granting an order to compel them to perform what the society required.

Mr. *Garrett* opposed the application, and said, that the contention amongst the members of the society arose from an influx of young men of low circumstances, and a combination amongst them to overpower the society and break it up, and to distribute the funds, which after so many years standing, now amounted to a considerable sum. Richards himself did not, in his affidavit, deny that they intended to divide the funds; he only stated, to his knowledge they did not contemplate such division to the injury of the old members; so that he did deny that he contemplated such division, but that he did not consider it would be to the injury of the old members; thus covering his intentions under an ambiguity of language. The trustees had no interest in retaining the money, as the whole of it was placed in the North Devon Bank, at Barnstable, where the accounts were constantly open to public inspection, and all the members of the society might satisfy themselves of their correctness; but they refused to deliver up the money, because they did not consider that the society had power to call on them to do so; and they were afraid, if they did deliver it up, an improper use would be made of it, as it was evident, that the only object for appointing new trustees could be the getting possession of the funds, for the purpose of distributing them amongst the members, and thus destroy the object of the society.

The *Vice Chancellor* said, that it was quite a clear case, that a majority of fifty to two of a society could dispose of their funds as they thought proper. He ordered, that the funds and securities should be delivered up to those persons appointed by the society for receiving them. *In the matter of the Barnstaple Friendly Society*. Sittings in Lincoln's Inn, after Trinity Term. V. C.

KING'S BENCH.—PRACTICE COURT.

JUDGE'S ORDER TO HOLD TO BAIL.—TROVER. —MERITS.

Where a defendant has been arrested in an action of trover by a Judge's order, the Court will not enter into the question of merits, for the purpose of discharging him on filing common bail.

Follett shewed cause against a rule obtained by *Humfrey*, for discharging the defendant but of custody, on filing common bail. It was an action of *trover*, and the defendant had been held to bail by a Judge's order. The present application was made on an affidavit, setting forth the peculiar circumstances under which the debt had been contracted. But those were merits, and into them the Court would not now enquire, where the arrest was by a Judge's order, any more than it would in any other case where a defendant was held to bail upon *mesne* process.

Humfrey, in support of the rule, contended that the order to hold to bail was obtained entirely *ex parte*, and differed from the ordinary case of holding a defendant to bail on a claim, which entitled the plaintiff to arrest the defendant without having recourse to the discretion of a Judge.

Patteson, J.—I can't interfere in the present instance. I enquired into the merits of a similar case once, and I was told by the whole Court, that it was wrong for me to enter into the question of merits at all at any time. I understand the rule to be quite strict.

Rule discharged, without costs.—*Brackenbury* v. *Needham*, June 9, 1832. K. B. P. C.

BAIL.—NOTICE OF JUSTIFICATION.

A notice of justification, stating that the bail has "within the last six months resided," &c., is not sufficient under R. 2. Reg. Gen. T. T. 1. W. 4.

Manning opposed bail on the ground of a defect in the notice of justification. The notice stated, that the bail had "*within* the last six months resided," &c.:—this was insufficient under R. 2. Reg. Gen. T. T. 1 W. 4. That rule required, "that every notice of bail shall, in addition to the descriptions of the bail, mention the street, or place, and number, (if any) where each of the bail resides, and all the streets, or places, and numbers, (if any) in which each of them has been resident at any time within the last six months, and whether he is a housekeeper or freeholder." The words of this notice did not give any thing like the information required by the rule. For the words of it might be perfectly true, and yet the bail might not have resided at the place stated more than a single day.

Patteson, J.—The notice is not sufficient.

Bail rejected.—*Johnson's bail*, June 8, 1832. K. B. P. C.

ATTORNEY'S ADMISSION.—SERVICE UNDER ARTICLES.

If, during the five years, a clerk is assigned for a certain period, and at its conclusion re-assigned to his original master, the name of the assignee must be stated in the notice of the clerk's intention to apply for admission.

Archbold applied to admit an articled clerk as an attorney, under these circumstances. Having been articled, he served two years. He was then assigned for fifteen months. He was then re-assigned to his original master, and with him he served the remainder of his term. By some oversight, he omitted to mention the name of the assignee in the notice of his intention to apply for admission. It was mere accident, and therefore it was trusted that the Court would allow him to be admitted. *Cur. adv. vult.*

Patteson, J.—I have consulted the Judges in this matter, and they all think that the notice will not do. They are all of opinion that the notice should contain the name of every person with whom the clerk has served. If we once relax the rule, although this may be a hard case, we don't know where it will stop; for hard cases make bad law.

Rule refused.—*Ex parte* ——, June 8, 1832. K. B. P. C.

ADMISSION OF ATTORNEY.—SERVICE UNDER ARTICLES.

If, during the five years an articled clerk has been absent two months, by consent of his master, at his father's house, and at the end of the five years has served two additional months, he will be entitled to admission.

Kelly applied to admit an articled clerk as an attorney, who had served the whole of his five years, with the exception of two months. Those two months he passed, by his master's consent, at his father's house. At the end of the five years, however, he served two additional months.

Patteson, J.—I think that will do. He may be admitted; *Ex parte Hubbard*, June 7, 1832. K. B. P. C.

NOTES OF THE WEEK.

THE NEW OFFICERS OF THE EXCHEQUER OF PLEAS.

By the 1 & 2 W. 4, c. 110, which received the Royal Assent on the 15th Aug. 1832, the following five principal officers of the Court of Exchequer of Pleas have been appointed, exclusive of the office of Clerk of the Pleas, held by William Stewart Rose, Esq. which office is to cease on his demise:

Masters or Prothonotaries:

Thomas Dax, Esq.
Kenrick Collett, Esq.
Edmund Walker, Esq.

Clerk of the Rules:

Stephen Richards, Esq.

Filazer:

George Chilton, Esq.

The offices are held during good behaviour, and in case of any doubt respecting the duties to be performed by each, the Lord Chief Baron and the other Barons are authorized to determine the point.

The officers are empowered to appoint clerks and assistants, with the approbation of the Chief Baron. They are to cease practising as attorneys or solicitors, or as agents, from the second day of Easter Term, 1833.

The Senior Master or Prothonotary is also to be Clerk of the Errors.

The salaries[a] of the five officers are to be fixed by the Barons, with the approbation of the Lords of the Treasury. There is to be

[a] We understand the salary will be 1500*l.* a-year.

no compensation in case any of the offices should be abolished. During the life of Mr. Rose, he is authorized to fill up vacancies in the above offices, with the approbation of the Chief Baron; and, after Mr. Rose's death, the appointment will devolve to the Chief Baron.

ADMINISTRATION OF JUSTICE IN THE COURT OF CHANCERY.

It was understood that the Lord Chancellor's Bill for the improvement of the administration of justice in the Court of Chancery would have been immediately printed, in order that not only the Members of both Houses of Parliament, who are interested in the matter, but the legal profession in general, might have an opportunity maturely to consider all the details, as well as the general principles, of the measure. In this expectation we have been disappointed: we are informed that some weeks at least will elapse before the printing of the Bill will be completed. We reckon, however, upon an early copy, and shall lose no time in putting our readers in possession of it. It has in fact been printed, but the necessity of some alterations prevents its delivery.

LEGAL OBITUARY.

To the name of Sir Albert Pell, the Senior Judge of the Court of Review,—a memoir of whom will shortly appear,—we have to add that of Mr Cooke, the King's Counsel. A notice of the latter will also be furnished.

ANSWERS TO QUERIES.

LAW OF PROPERTY AND CONVEYANCING.

WILL.—MONEY IN THE FUNDS. P. 288.

1. Notwithstanding the apparently express words of the statutes respecting stock, it is not now deemed necessary that a will, in order to pass stock, should be attested by two witnesses. A bequest of stock, whether the will is or is not attested by two witnesses, is considered effectual to pass the subject bequeathed to the legatee. "Under all the acts," says Lord Eldon, "stock cannot be given by will, except by two witnesses; yet this Court often considers it given without witnesses." *Ripley* v. *Waterworth*, 7 Ves. 440. "And certainly," observed Lord Gifford, "it is now, I apprehend, too late to doubt that this Court would make a bequest of stock effectual, though the will bequeathing it were not attested by two witnesses." *Franklin* v. *The Bank of England*, 1 Russ. C. C. 589. These authorities, therefore, would clearly imply, that *B.* has an equitable claim to the stock, independently of his sisters. M.

2. Notwithstanding that the statutes 33 G. 3, c. 28, § 14, and 35 G. 3, c. 14, § 16, require a will, disposing of stock, to be attested by two witnesses, such omission will not invalidate the bequest, for it will *vest* in the *executor*, for the benefit of the person entitled to the *residuary personal estate*: therefore *B.* need not be under any apprehension of having to refund any *portion* of it to his brother and sisters.

T. T. P.

3. The money in the funds passed under the bequest to *B.* of all the testator's *personal estate*, notwithstanding the will was unattested. At law, the will would be ineffectual as a bequest of the stock, unless it were attested by two witnesses, as required by the statutes 33 G. 3, c. 28, § 14, and 35 G. 3, c. 14, § 16; but in equity, although unattested, it operates as a direction to the executor how to apply the stock, and he is held to be a trustee for the legatee, even where the bequest is a general residuary one, as in the present instance. *Vide Ripley* v. *Waterworth*, 7 Ves. 441, 452.

I. B.

DEVISE.—ANNUITY. P. 304.

1. By the terms of the devise, none of the children can acquire any interest in the 700*l.* till the decease of *D.* their mother, as it is only given "to such issue of *D.* as shall be living at her decease:" therefore, till her decease, the description of issue to take cannot be ascertained; perhaps she (*D.*) may die without having any issue. *D.'s* son, at present, takes no interest in the charge; but if he survive his mother, and attain twenty-one, he will (if the only issue) become absolutely entitled to it, with the right, if he be under age at his mother's decease, of having the proceeds applied for his benefit during his minority. The grand-daughter, of course, cannot take any interest in it, as she cannot possibly come under the description of *D.'s* issue living at her decease. J.

2. The testator's grandson takes a vested interest in a moiety of the sum bequeathed to the children of *D.*, liable to be reduced by the birth of any after-born child or children of *D.*, who will, in such event, take the same in equal proportions. And the other moiety, (in the absence of any settlement being made on the marriage of *D.'s* daughter,) is vested in her husband, who, on *D.'s* decease, and on his obtaining administration to his wife's effects, will be entitled to receive it; but if he dies in the mean time, the moiety cannot be paid to his executors or administrators, without the next of kin of his wife taking out administration to her estate, who will then be a trustee for, and obliged to pay the same to such executors or administrators. E. M.

COMMON LAW.

PUBLIC BRIDGES. P. 304.

The bridge seems to have been used and adopted by the *public*. I should therefore think, notwithstanding 43 G. 3, that the county

is bound to repair. See *Rex* v. *Inhabitants of Bucks*, 12 East, 192; also *Rex* v. *Inhabitants of the West Riding of York*, 2 East, 341; and *Rex* v. *Inhabitants of Glamorgan*, *ibid*, 355. The first case appears to have been decided seven years after 43 G. 3, independently of which, I doubt whether the present case comes within its provision; for this bridge appears rather to have been built by a public body of men acting under an act of parliament, and defrayed by tolls, than "at the expense of an individual." At all events, 22 Hen. 8. throws the *onus* on the county, of shewing who is bound to repair. J.

LAW OF ELECTIONS.

REFORM ACT.—JOINT OCCUPIERS. pp. 271, 287, 303.

The polite manner in which Aspiro offers his objections (see p. 303), obliges me to reconsider my opinion. His first objection, I must observe, begs the question. By the 27th section of the Reform Act, the occupiers, not only of houses and warehouses, but of counting-houses and shops, and also of "other buildings," are entitled to vote: the question then is, of what other buildings? and I reply, 1st, of all other kinds of buildings *like* houses and warehouses, and therefore of all those different kinds of *entire* buildings, which are neither houses nor warehouses; such, for instance, as stables, barns, granaries, founderies, and the like, which probably would be held not to confer a vote, but for the expression "other buildings." And 2dly, I reply, of all other buildings *like* counting-houses and shops, and therefore of all other *parts* of buildings forming separate occupations. A person occupying part of a house, though merely for habitation, is he not as much an occupier as if he occupied merely to carry on business, without inhabiting? The decisions in analogous cases unanimously support this interpretation. In sentences like the one in question, the things *particularized* are always regarded as instances of the things, or *kinds* of things, meant to be denoted by the words of general import, without being particularized.

To the second objection, that a person is not a householder, and cannot vote as such, who has not the control of the outer door, I reply, that the word householder does not occur in the 27th section; that consequently the old cases, in determination of what was necessary to constitute a person a householder in the boroughs, where householders alone could vote, are irrelevant; and that the question of who, besides the occupiers of houses, warehouses, counting-houses, and shops, are entitled to vote, depends entirely on the interpretation of the words "other building."

As to the objection, that the occupier of part of a house, or *apartments*, is not assessed nor rated, I reply, that to all to whom the franchise is given, the act gives the right to be rated. The first question therefore is, What classes of occupiers are included in the formula employed to describe the voters; and that being ascertained, all those classes, whether heretofore rated or not, are entitled in future to be rated. It is sufficient, if the voter demands to be rated. And as to his not being assessed to the King's taxes, I reply, the act does not require that he should be assessed; but simply that if he is, he should have paid the taxes up to the day specified. The voter must be rated to the poor, or at least he must have demanded to be rated; but an assessment to the taxes is unnecessary. The 20th section, from which Aspiro draws an argument, relates to county voters only, and not to those of cities and boroughs. W. T.

PRACTICE.

JUDGMENT.—EJECTMENT.—ORIGINAL. P. 287.

In signing judgment by default in ejectment by original, it appears not to be necessary to enter an appearance. The common bail is filed according to the rule of M. 33 Car. 2. The rule does not mention an appearance to a proceeding by original, I believe; therefore it is not necessary. In practice, I think the appearance in this case is never entered by the plaintiff on signing judgment. Mr. Lee, in his Dictionary of Practice, appears to be of the same opinion; see title Ejectment, Practical Directions. L. H. I.

ENGLISH NOTICE UNDER THE NEW PROCESS ACT. pp. 240, 256, & 270.

1. T. T. declares he is "not satisfied" with my reply to his query hereon, principally because the 2 W. 4. c. 39. does not, in so many words, repeal the 12 G. 1. c. 29; 5 G. 2. c. 27; and 21 G. 2. c 3. He admits, however, that adding the notice in question to a summons would not be giving any additional information, but would be tautologous. As there is no question, that adding the notice would not make the process or service void, T. T. may therefore add it if he please, and avoid the other question; but whenever it is raised, I think there is no doubt that the summons, without further notice, would be held good. The late act directs that the proceess shall be in a certain form, and that form is in itself a notice to appear, and therefore no notice is appended. T. T. states that no "judge-made law" has yet repealed an act of parliament; nor would it be logical to decide that the copy process should be also a notice written *upon* itself. Now, I apprehend it is quite competent to a Court, *in a matter of practice*, to decide whether an act of parliament does not virtually repeal a former act; if so, the illogical conclusion is not one of the horns of a dilemma that I am driven upon. As an instance of the decision of a Court, in a practical matter, being somewhat different from the letter of the law, take the 14 G. 2. c. 17. § 4, which enacts, that where a defendant resides above forty miles from town, no cause shall be tried in London or Westminster, &c., unless notice of trial has been given at least ten days before such in-

tended trial. It was clear the legislature intended that ten days should be held sufficient; but the statute having no negative words, the Court held fourteen days notice necessary for causes in London, where the defendant resided above forty miles from that city. A.

2. With submission, I think T. P. is not correct in his assumption, at p. 270, that "the 12 G. 1, and 5 and 21 G. 2, must be taken to be necessarily repealed." An act of parliament can, I believe, be *only* repealed by an act of parliament passed *for that purpose*. See 1 Black. Com. tit. Prerogative. To allow acts of parliament to be repealed by mere *implication*, might introduce very great confusion. Still, as the objection could only be urged either for delay or quibbling, I think the Court would assist a plaintiff as much as possible. The words of 12 G. 1. are, "*upon* which shall be written an English notice," &c.; neither the form of the notice, nor the particular part of the process, when it is to be inserted, are here limited. Under these circumstances, I should think the Courts would hold the notice contained on the face of the writ of summons (under the new act), a sufficient compliance with 12 G. 1. This notice is much clearer than the old form, and better answers the view with which 12 G. 1. was framed, *viz.* to inform the defendant of the nature and consequences of the process. But I perfectly agree with T. T. that the old English notice, however tautologous, will, for safety, be necessary.

J.

QUERIES.

COMMON LAW.

STATUTE OF LIMITATIONS.

Testator, in 1803, left an estate to his wife for life, with remainder to his son in fee. Testator died, and the son mortgaged his interest in the property to *A.*, and soon afterwards conveyed his equity of redemption to *B.*. The son became insolvent, and took the benefit of the act; and there are now about sixteen years interest due to *A.* on his mortgage. Can *A.* recover out of the estate, his sixteen years interest, or only six years? The testator's wife died in 1831. A CONSTANT READER.

EMBLEMENTS.

On the death of tenant for life, in November last, a close or two of the farm being then sown with corn, his executor, or occupying tenant, was entitled to the corn, as emblements, and being come to maturity, he has reaped and carried off the same. The reversioner now claims from the executor or tenant, compensation for the *use and occupation* of the land, from November to September (nine months), according to the annual value, to be let; and the reversioner contends, that if not so entitled, he may clearly require contribution towards the *rates and taxes* for the whole farm, which have been paid by him, the same being assessed in one sum, in the name of the late tenant. Can these claims, or either of them, be legally supported? J. A. M.

LAW OF LANDLORD AND TENANT.

EXECUTOR'S LIABILITY.—DILAPIDATIONS.

A testator dies leaving property, principally of leasehold houses, and held subject to the usual repairing covenants: can his executors, after sale of such property, safely divide the proceeds amongst the testator's next of kin, without reserving any fund to answer for dilapidations at the expiration of (or during) the terms? and could executors, under such circumstances, plead, to an action brought by the original lessor for the amount of such dilapidations, *plene administravit*, they having full notice that such dilapidations would (or might) exist, and that, if so, such claim would be made? X.

REPLEVIN.—SECOND ACTION.

In a disputed tenancy, the landlord makes distress for the rent due, and on the tenant replevying, suffers judgment to go by default. Is he permitted to resort again to the same remedy for the same arrears of rent; and can he, as more rent becomes due, couple in a distress for such subsequent arrears, those for which he has already distrained, and which he has abandoned in the suit of replevin?

LAW OF ATTORNEYS.

RE-ADMISSION.

Is an attorney who has been re-admitted in consequence of having neglected to take out a certificate for twelve months, competent to practise in the other courts, and as a solicitor of the Court of Chancery, (in which he was admitted in the first instance,) or must he make a like application in those courts before he can again practise therein in his own name? A. Z.

LAW OF ELECTIONS.

REFORM ACT.—RESIDENCE.

Section 32.—A burgess living in borough *A.*, and occupying a house and premises there, in the month of April last, let his house, furnished, to another gentleman, for three months, and put out his servants at board wages. The burgess left the town, and spent the three or four months in London, and at different watering places, and has now returned to *A.*, and resumed the occupation of his house, and claims to be registered as a burgess. This section requires a residence for six calendar months next previous to the last day of July. There is no doubt the burgess intended returning to *A.*; but as he let the house, and dismissed the servants, it is thought,

although he paid all taxes, rates, &c. he was not a resident in the meaning and spirit of the act. Will he be entitled to be registered?

A CONSTANT READER.

LAW OF PROPERTY AND CONVEYANCING.

PROGRESSIVE STAMP.

Is the indorsement of the title, or purport of a deed or instrument, to be counted in words, for the purpose of progressive duty? and what effect would be produced, as to stamp duty, by an arbitrary indorsement of matter to *any* length, made by a person not a party to the deed, and perhaps at a remote period, such as a memorandum of a covenant for production, or of an incumbrance, or of part of the premises having been sold, and either signed or not by any person?

J. A. M.

LEGACY DUTY.—INSURANCE.

A. insured his life, in 1816, for 1000*l.* The accumulations upon the policy amount to 500*l.* and upwards. He is lately dead, testate. By the terms of the policy, the money becomes payable *to his executors* at the end of *three calendar months after* his decease. As the *testator*, therefore, does not "die possessed" of the money, does the probate or legacy duty attach upon both, or either of the above sums?

M. P. T.

COMMON RECOVERY.

Tenant in tail dies, leaving a widow entitled to dower: his eldest son takes possession, and disputes the widow's claim; but no proceedings are taken by the widow: the son suffers a common recovery, for barring the entail and remainders, previously executing the usual conveyance of the freehold by lease and release, for making a tenant to the *præcipe*; but the widow is not a party. Is such recovery effectual, as to the entirety of the land? or does it operate only on two undivided third parts, the widow being clearly entitled to, though not in possession of, one-third for her life, as her dower?

J. A. M.

DESCENT TO AN HEIR DEFEATED BY A POSTHUMOUS HEIR.

Can an heir presumptive immediately make a good title to land descended to him? or can any sale to a purchaser, for a valuable consideration, be disturbed by the posthumous heir? and, if not, is the posthumous heir entitled to the purchase money from the hands of the previous heir presumptive, who may have spent it and be insolvent? If not, it will, of course, be the interest of every heir presumptive forthwith to convert the estate into money, and so defeat the claims of a posthumous heir. The law, as to the profits of the estate, appears sufficiently defined.

O.

MISCELLANEA.

TRIAL OF EARL BOTHWELL.

The Indictment.—"You, James Earl of Bothwell, Lord of Hallis, Creygchton, &c. are indicted on account of the cruel and horrid murder of the most excellent, most high and most mighty Prince the King, the late most dear spouse of the Queen's Majesty, our sovereign lady, committed in the dead of the night, at his house near the Church of the Fields in this city, as he was taking his rest, by treasonably setting fire to a great quantity of gunpowder in the said house, by the violence whereof the whole house was blown up into the air, and the King himself by you killed traitorously and cruelly, wilfully, and by premeditated felony. And this you did the 9th day of February last past, in the dead of the night as aforesaid, *as is notorious, and you cannot deny.*"

Upon the producing of which letters, so executed, indorsed, and published, the advocate demanded an act and instrument in the Court, and required that the Judge should proceed according to the form of them.

These letters being read with the indorsements, the Judge by virtue thereof, ordered the said James Earl Bothwell to be called as defendant of the one part, and Matthew Earl of Lennox, and all other subjects of our said sovereign lady, pretending to prosecute this matter, as plaintiffs on the other part; that they might appear in Court, and exhibit their complaints and defences, according to the laws of the realm.

And immediately appeared the said James Earl Bothwell, and entered the Court in person; after which he chose Master David Brothwick of Lutchill, and Mr. Edmund Hay, for his advocates, who appearing also, were admitted by the Judge for that effect.

[Then follow some other formalities, and the protestation of the Earl of Lennox, by Robert Cunningham, his servant.]

The Judge, considering the writing and protestation produced by the said Robert Cunningham, and having regard to the letters sent to our sovereign lady by Matthew Earl of Lennox, also produced and read, by which letters and writing the said Earl of Lennox requires, that a brief and summary trial may be made of this cause: And having also regard to the act, and the order thereupon taken by the Lords of the Privy Council, and other such things; and to what the advocates insist upon as to the same fact, requiring that justice may be done to the said Earl Bothwell; and taking notice likewise of the request and demand which he has made, that the whole may be thorowly examined; the Judge, by the advice of the Lords and Barons his assistants, found that they ought to proceed to the decision of the said cause the same day, according to the laws of the realm, notwithstanding the writing and protestation produced by the said Robert Cunningham, and no other prosecutor appearing, the Court proceeded, and acquitted the said Earl of Bothwell of the murder.

The Legal Observer.

VOL. IV. SATURDAY, SEPTEMBER 29, 1832. No. CII.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

THE CRIMINAL COURTS OF ENGLAND.

LETTERS OF A HEIDELBURG STUDENT, ON THE JURIDICAL INSTITUTIONS OF GREAT BRITAIN.

LETTER VII.

HAVING in my former letter described to you the chief Civil Courts of this country, I am now anxious to give you some account of the principal Criminal Courts; and in doing this, I shall take the opportunity of sending you, either in this or a subsequent letter, some particulars as to the existing state of crime, and the punishments which are here awarded to criminals.

The mode of trying and bringing up offenders for punishment is pretty nearly as follows:—If a crime is committed and detected, and the person injured is desirous of proceeding against the culprit, he applies, if in London, or any other large city, to a police-office, or if in the country, to a justice of the peace, for a *warrant*. Of course, if the crime is committed in the presence of any police-officer, it is his duty to take the offender into custody, or the person injured may deliver him to such officer. The offender is then brought before a police magistrate, or justice of the peace, and if the crime can be proved against him, he is committed to prison to take his trial for it before a jury; and of course very trifling evidence or circumstances against him are sufficient to warrant this preliminary proceeding. It is proper to observe, that the magistrate has a discretionary power of "taking bail" even for capital offences, instead of committing the person charged with the crime. The commitment having taken place (or the bail having been given), the person injured, now called the prosecutor, who has entered into recognizances to proceed, prefers a bill, in the name of the King, to the grand jury, against the prisoner; and if there is a tolerable case made out against him, this bill is found "a true bill," and he then takes his most important trial, before the petty jury.

This is the grand stage of criminal business. If the offence is of a minor character, it frequently takes place at the quarter sessions of the county or city in which the offence was committed, at which a chairman and bench of justices of the peace or other magistrates preside, with a jury. Here, in general, both parties are assisted by counsel, who are nearly always the younger men of the profession. If the offence be a capital or important offence, and of any peculiar difficulty, it is tried, if it be committed in any other place but London or Middlesex, by one of the judges of the circuit, whom I recently described to you, and a jury, assisted of course by counsel and attorneys. If the offence is committed in London, or in the county of Middlesex, the prisoner is tried by the most important criminal court in the kingdom, called by the name of "The Old Bailey," from the place in which it holds its sittings. This court is subdivided into two courts.

In the principal one, two of the fifteen judges preside, assisted by the lord mayor or aldermen of London; and here, generally, all capital offences are tried. In the other court, the recorder, deputy recorder, or common serjeant presides, for the disposal of minor offences; and in these courts we frequently see the first lawyers of the country, although the ordinary practitioners do not by any means hold the first rank.

I have now mentioned to you the courts. I must add some few particulars relating to the course of criminal procedure, which have struck me. In the first place, counsel for the prisoner are not permitted to address the jury, which, although it greatly tends to the dispatch of business, yet considerably takes off from that appearance of fairness which in general strikes a spectator in a British court of justice. Then, one is particularly surprised at the frequency of the sentence of death. It is no unusual thing, at the Old Bailey, to see twenty men condemned to be hanged in the course of one day. And this brings me to another singularity in the actual administration of justice in England—I mean, that the trial in the court, before the judge and jury, is by no means decisive as to the fate of the criminal, except as to murderers. The sentence of death passed upon them is immediately carried into execution; but all other capital felons are only nominally condemned to death. Their cases are afterwards submitted to the King in Council, and by this tribunal it is decided whether the sentence of death shall be carried into effect, or whether the criminals shall be transported for life. If any of the convicted felons are actually ordered for execution, there is generally a fresh enquiry gone into by the Secretary of State for the Home Department, which arises from the exertions which are generally made by the friends of the prisoner to save his life. I shall shortly enter further into this subject—at present I must break off. Ever yours,

* * * *

THE PROPERTY LAWYER.

No. V.

THE ADMISSIBILITY OF PAROL EVIDENCE TO EXPLAIN A WILL.

The question of the admissibility of parol evidence to explain a will, has given rise to a large class of cases. One great rule is, that the testator's intention is to be collected from the words used in the will, and that the words which he has not used cannot be added. See *Dean* v. *Page*, 3 T. R. 87. It was on this principle that the late case of *Miller* v. *Travers*, 8 Bing. 244, was decided, which was heard before the present Lord Chancellor, the Lord Chief Justice of the Court of Common Pleas, and the Lord Chief Baron. The facts were shortly as follows:—

The devise was of all testator's freehold and real estates in the county of Limerick and city of Limerick. Testator had no estates in the county of Limerick, a small estate in the city of Limerick, inadequate to meet the charges in the will, and estates in the county of Clare, not mentioned in the will. And the main question between the parties, and which formed the principal subject of argument, was this:—whether parol evidence was admissible to shew the testator's intention that his real estates in the county of Clare should pass by his will? There was also a subordinate question, as to the due execution of one sheet of the will.

"This question," said Chief Justice *Tindal*, (meaning the first) "arises from facts either admitted or proved in the cause, which are few and simple. The real estate, in the city of Limerick, was admitted to have passed under the devise; but the plaintiff contends that he is at liberty to shew, by parol evidence, that the testator intended his estates in Clare also to pass under the same devise. The general character of the parol evidence which the plaintiff contends he is at liberty to produce, in order to establish such intention in the devisor, is this; first, that the estate in the city of Limerick is so small and so disproportioned to the charges laid upon it, and the trusts which are declared, as to make it manifest that there must have been some mistake; and in order to shew what that mistake was, the plaintiff proposes to prove that in the copy of the will which had been submitted to the testator for his inspection, and had been approved and returned by him, the devise in question stood thus:—'All my freehold and real estates whatsoever, situate in the counties of Clare, Limerick, and in the city of Limerick;' that the testator directed some alterations to be made in other parts of the will, and that the same copy, accompanied with a statement of the proposed alterations, was sent by the testator's attorney to his conveyancer, in order that such alterations might be reduced into proper form; and that upon such occasion the conveyancer, besides making the alterations directed, did, by mistake, and without any authority, strike out the words 'counties of Clare,' and substitute the words 'county of,' in lieu thereof, so as to leave the devise in question in the same precise form as it now stands in the executed will. The plaintiff further proposes to prove, that a fair copy of the will, so altered, was sent to the testator, who, after having kept it by him for some time, executed the same in the manner re-

quired by law, without adverting to the alteration above pointed out. Indeed, without entering more minutely into the detail of the evidence, it may be taken for the purpose of argument, that if parol evidence was admissible by law, the evidence tendered in this case would be sufficient to establish, beyond contradiction, the intention of the testator to have been, to include his estates in Clare in the devise to the trustees. Upon the fullest consideration, however, it appears to the Lord Chief Baron and myself, that, admitting it may be shewn from the description of the property in the city of Limerick, that some mistake may have arisen, yet still, as the devise in question has a certain operation and effect, namely, the effect of passing the estate in the city of Limerick, and as the intention of the testator to devise any estate in the county of Clare, cannot be collected from the will itself, nor without altering or adding to the words used in the will, such intention cannot be supplied from the evidence proposed to be given. It may be admitted, that in all cases in which a difficulty arises in applying the words of a will to the thing which is the subject matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain what was the estate or subject-matter really intended to be devised, or who was the person really intended to take under the will; and this appears to us to be the extent of the maxim, '*ambiguitas verbarum latens verificatione suppletur.*' But the cases to which this construction applies will be found to range themselves into two separate classes, distinguishable from each other, and to neither of which can the present case be referred. The first class is, where the description of the thing devised, or of the devisee, is clear upon the face of the will; but upon the death of the testator, it is found that there is more than one estate or subject-matter of devise, or more than one person, whose description follows out and fills the words used in the will. As where the testator devises his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and West Dale; or a man devises to his son John, and he has two sons of that name. In each of these cases respectively, parol evidence is admissible to shew which manor was intended to pass, and which son was intended to take. (Bac. Max. 23. Hob. Rep. 32. *Edward Altham's case*, 8 Rep. 155.) The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular. As where an estate is devised called *A.*, and is described as in the occupation of *B.*, and it is found that although there is an estate called *A.*, yet the whole is not in *B.*'s occupation; or where an estate is devised to a person whose Christian or surname is mistaken, or whose description is imperfect or inaccurate, in which latter class of cases parol evidence is admissible to shew what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence. But the case now before the Court does not appear to fall within either of these distinctions. There are no words in the will which contain an imperfect, or indeed, any description whatever of the estates in Clare. The present case is rather one in which the plaintiff does not endeavour to apply the description contained in the will to the estates in Clare, but, in order to make out such intention, is compelled to introduce new words and a new description into the body of the will itself, and on this ground parol evidence was rejected."

The case of *Doe d. Oxenden* v. *Chichester*, 4 Dow. 65, is in conformity with this decision. As to the second point, whether the sheet of the will, numbered twenty, forms any part of the will, as it was a mere question of fact, an issue was allowed, if the parties should think proper to have it. The Lord Chancellor concurred with the opinion of the other learned judges.

REVIEW.

A Letter to the Right Honorable Lord Brougham and Vaux, on the Subject of the Magistracy of England. Cawthorn.

We some time ago noticed the subject of Grand Juries, in the constitution of which there appears considerable room for improvement.[a] We have now to direct the attention of our readers to the Unpaid Magistracy,—a subject on which we have received a pamphlet bearing the above title, and from which we intend to make some extracts well deserving consideration.

It may be proper, in the first place, briefly to state the Acts of Parliament relating to the appointment of Magistrates. They are as follow:—

The 18 Edw. 3. ordains, that two or three of the *best reputation* in each county shall be assigned to be keepers of the peace.

The 34 Edw. 3. ordained, that one lord, and three or four of the most *worthy* men of the county, with *some learned in the law*, shall be made justices, in every county.

The 12 & 14 Rich. 2. restrained them at first to six, and afterwards eight only, of the most sufficient knights, esquires, and *gentlemen of the law.*

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[a] *Vide* p. 9.

The 18 Henry 6. c. 11, ordains, that no justice of peace within the realm of England, in any county, shall be assigned or deputed, if he have not lands and tenements to the value of 20*l.*; and further, that if there be not sufficient persons, having lands or tenements to the value aforesaid, *learned in the law*, and of good governance, within any such county, that the Chancellor of England shall have power to put other discreet persons, *learned in the law*, in such commission, though they have not land or tenements to the value aforesaid, by his discretion.

The writer observes, that the above statute is remarkable as being the first act of the legislature that fixes any precise amount of *property* as a qualification, and the last which recognizes the necessity of *intellectual and moral fitness* for the office of a county magistrate.

The 18 Geo. 2. c. 20, states, that whereas it is become of the utmost consequence to the commonwealth, to provide against persons of mean estate acting as such; and whereas the laws now in force are not sufficient for that purpose; be it enacted, that no person shall be capable of acting as a justice of the peace who shall not have one hundred a-year, or the reversion of three hundred a-year, arising out of land.

The above statute, it will be observed, takes no notice of the necessary qualification of some learning in the law, but only provides against *persons of mean estate* acting as such.

The author then proceeds to observe that—

"For a century subsequent to the first establishment of justices, provision was made, that a large proportion of the body should consist of men of the law, and that no judicial act should be performed without the countenance and guidance of one of those persons.

"The Lord Chancellor himself appoints the judges of the superior courts; yet, though he issues the commission of the peace, the Lord Lieutenant of the county names the persons to be appointed, without the interference of the Crown's responsible advisers. The Lord Lieutenant of the county, as *custos rotulorum*, absolutely appoints all the justices of the peace, in his county, at his sole will and pleasure—he may, in any new commission, endeavour to leave out names, which I believe, was done in the West Riding of the county of York; but it was laid down as a general rule by the late Lord Chancellor, Earl Eldon, that, however unfit a magistrate might be for his office, either from private misconduct, or party feeling, he would never strike out his name until he had been convicted of some offence by the verdict of a court of record. In the exercise of the patronage of the Lord Lieutenant, no responsibility whatever substantially exists; justices are therefore appointed by irresponsible advisers; irremoveable without a conviction for some tangible offence."

The writer then enumerates the several branches of jurisdiction which may be exercised by Justices of the Peace. They can transport—they can take away licences from publicans, which often constitute the greater part of the value of their premises—they can send a distress, or search-warrant, into a private man's dwelling—they can consign their fellow-men to the stocks—flog, and imprison for one or more years. He observes that "an appeal is given to the quarter sessions; but it may be, and is often, an appeal to themselves, sitting in another place." And he thus continues:—

"The judges of the courts above are held responsible; their acts are narrowly watched; if they err, they are called to an account before another tribunal: they, who have spent their lives in acquiring a knowledge of the laws, the bearings and competency of testimony to establish guilt, may be called upon to support their decisions, that error, if any, may be rectified, and a new trial awarded. If even Lord Tenterden, the Lord Chief Justice, erroneously dispenses the law on the circuit, in Westminster, or Guildhall, his conduct is investigated before his brother judges in public court: not so with the unlearned justices of petty or quarter sessions—their judgments are final."

The writer subsequently goes on to remark upon the number of *Clerical* Magistrates. We extract some part of his observations:—

"I would have the clergy honoured and respected; and I know no more effectual means to render them so, than to detach them from avocations which cause them to become the castigators and persecutors of the body, rather than the comforters and healers of the soul. The duties of a clergyman and magistrate are totally incompatible. It is the duty of one to reform—it is the business of the other to punish. The clerical magistrate becomes a terror to those whom he should conciliate in order to amend; with him, fine and imprisonment supply the place of precept and admonition; and the pure doctrines of morality are exchanged for the jargon of an act of parliament. The visit of the pastor to the delinquent, is no longer to turn him from his wickedness, but to convict him of his crime. The justice and parson of the Established Church cannot utter these benign words, 'Go, and sin no more:' but says, 'If you have sinned, it is my duty to find the fit penalty in the statute book.' * * * * I wish less of the attention of the clergy were devoted to Burn's Justice and tithe law—less of their time occupied on the

bench—less of their respectability compromised by hasty and intemperate inflictions for slight offences; they would be better known and more respected by their parishioners—have more inclination and leisure to conciliate the affections of their flock; and exercise that godlike influence in inculcating those doctrines, the superiority and wisdom of which have rendered them the religion of the state."

A table is then given of the number of magistrates in the several counties, lay and clerical: and the author afterwards notices the statement that these justices cost government nothing;—but, he observes, they cost the community a great deal; and he says,

"Let me imagine a foreigner, having heard the laws of England eulogized, and himself introduced for the first time into a court of quarter sessions. He is informed he is entering a court of justice, both civil and criminal—that the judges can sentence to fine, imprisonment, whipping, hard labour, and banishment. He advances with becoming awe—on the bench he sees a certain number of persons *with their hats on*; these, he is told, are the judges. It occurs to him to ask, how these judges are selected, and by what course of study they have prepared themselves for the important trust? He is told, that one is a judge because he has an estate of 100*l.* a-year; another, because, if he lives long enough, he will have 300*l.* a-year, arising out of land. * * * Let me suppose the same foreigner taken into the Court of King's Bench at Westminster, and apprised that he is in the principal court of criminal jurisprudence known to the law of England: he will ask, what estate they or their fathers are obliged to possess? and whether the Duke of Northumberland is Chief Justice?"

The following extract shews the objectionable nature of much at least of the present practice.

"This Court of Quarter Sessions, composed of the judges of Petty Sessions, and sometimes the same who decided the cause in Petty Sessions, against which there is an appeal made, sit in judgment upon the legality or illegality of their own acts; and if it is before other justices, if the opinion of any barrister, or attorney of any practice in this Court, is asked, respecting the judgments given, he will most probably give the same answer. I have often heard it said, by an attorney in good practice, that he has lost as many appeals that he expected to win, as he has won those which he had not the smallest expectation of winning.

"This uncertainty and irresponsibility gives birth to endless litigation; and an appeal against an order of removal is lodged, and tried as a matter of *speculation*. I knew an overseer for a very populous parish, who, when a pauper's family was brought under an order of removal, always gave notice of appeal immediately, without knowing anything of the merits; in which course he found his interest. So much for the uncertainty and imbecility of this Court. Bad as this Court is, there is no assurance that there will be *any court held to appeal to*. Unless two justices give their attendance, there can be no Court; and I knew an overseer, who was obliged to attend at Preston in Lancashire twice; he attended in the year 1826, and there was only one justice; he went home again, with a great many witnesses; he was obliged, with his witnesses, to attend another sessions. I have known sometimes sixty magistrates in attendance, and sometimes only *one*. This is the economy of gratuitous services, as they are called. The overseer above-mentioned expended above 70*l.*, as appears by a document of his now on my table.

"The office of a magistrate, when duly considered, is but a thankless one, to an honorable and feeling mind; to examine and determine the allowance to be given to bastard children; to receive the oaths of the mothers, often very questionable, as to the fathers of their illegitimate offspring; to consign their fellow-creatures to a dungeon, perhaps for an offence against the game laws. These are duties no gentleman would willingly entail upon himself; some do it from a praiseworthy motive, to check existing abuses in their own neighbourhood: if they succeed, they do it at a great price, and make sacrifices almost more than their country has a right to expect."

"The discontent in a neighbourhood may be accurately considered from the number of resident magistrates; to do the higher aristocracy justice, the people do not so much complain of them, as of the *busy, meddling parsons, and the small fry of magistrates*, who seek to distinguish themselves by their zeal in giving effect to laws, which, in ninety-nine cases out of a hundred, are only tolerable when allowed to sleep—in the number of committals to prison. I have often reflected upon Mr. Wyndham's observation, reported to have been made in Parliament, 'That he did not know a more noxious species of vermin, than an active Justice of the Peace.' No part of the community is, I am certain, more keenly sensible of the defective state of the commission, than those who are themselves the ornaments of it; and next to the poor, they would have the greatest reason to rejoice in a change which would increase the sphere of their real utility; preventing their good intentions from being frustrated by the incapacity of their fellows.

"It is ridiculous to contend that the present system of magistracy should be continued because it costs government nothing. Though it does not cost government anything, it costs the community a great deal: and I cannot separate the government and the community. Our ancestors reasoned very differently respecting the value of gratuitous services: 'Concluding that Justices of the Peace were likely to be influenced by the same motives which operate upon other men, and that their endeavours would not be pre-eminently zealous, who had no other active stimulant than the desire of being useful, they recommended the King to assign wages to the Justices; for

without wages, say the Commons, they will not trouble themselves about holding their sessions.'—*Roll Parl.* 50 *Edw.* 3. 67. (*Pet.* 16)."

The remedy which the writer recommends is that of the appointment of Assistant Barristers. We collect this incidentally from his Pamphlet; for it is not distinctly pointed out, nor is any scheme stated as to the number or selection of Barristers, or the extent of their remuneration.

ON THE LAW RELATING TO PUBLIC BRIDGES.

An enquiry was made in a recent number (p. 304), on the law relating to the repair of public bridges, and the party liable thereto under 43 Geo. 3. c. 59,—on which we have received the following communication:—

In order to answer the question with any degree of satisfaction, it will be necessary to apply some research into the law which affects this subject generally. In the first place, the principal statutes which regulate the erection and repairing of public bridges, are the 22 Hen. 8, c. 5,—5 W. & M. c. 11,—1 Anne, st. 1, c. 18,—12 G. 2, c. 29, § 13, 14,—14 G. 2, c. 33, § 1,—43 G. 3, c. 59,—52 G. 3, c. 110,—54 G. 3, c. 90,—55 G. 3, c. 143,—and 7 G. 4, c. 30, § 13. See also Burn's Just. tit. Bridges; Bac. Ab., Bridges: and 3 Chitty's Crim. L. 589 to 603.

The preamble of the stat. in question, (43 G. 3, c. 59,) refers exclusively to the repair, support, and maintenance of public bridges, "commonly called *county* bridges, within such counties respectively (in England), and the roads at each of the ends thereof, for limited distances;" and the fifth section of the act itself does not enact that every bridge, that is, every county bridge, thereafter to be erected, shall not be repaired at the expense of the county, unless erected immediately under the *direction* of the county surveyor; but to effect that object, the same must be done either under his direction, or to his satisfaction, or of the person appointed by the Justices of the Peace, *with reference to the substance and conveniency or commodiousness of such bridge or bridges;* and that condition is thus further qualified: "which surveyor or person so appointed, is required to superintend and inspect the erection of such bridge, *when thereunto requested by the party or parties desirous of erecting the same.*"

Bridges must be *repaired by the county, when it does not appear who else ought to do it. Rex* v. *W. R. Yorkshire*, 5 Burr. 2594; 2 W. B. 685; S. C. Loft. 238; 2 East, 342. And the county is bound to repair a bridge built by a private person, if it be of public utility. *Rex* v. *Glamorganshire*, 2 East, 356. And a bridge used only on occasion of floods, and lying out of and alongside the road commonly used, is a public bridge, and the county are liable to repair it. *Rex* v. *Devon*, 1 Ry. & M. 144. *But a parish or township, a corporation aggregate, or a private individual, may, in consequence of special prescription, or by reason of the tenure of certain land, be compelled to repair bridges;* Hale's P. C. 143; and see *Rex* v. *Inhabitants of Kent*, 13 East, 220. And the inhabitants of a county are not less liable to *widen* a public bridge, by force of their obligation to repair it. *Rex* v. *Devon*, 7 D. & R. 147.

Where a person, about forty-five years back, erected a mill and dam thereto, for his own profit, *per quod*, he deepened the water of a ford, through which there was a highway, but the passage through which was, before the deepening, very inconvenient at times to the public; and the miller afterwards built a bridge over it, which the public had ever since used: is was held, that the county, and not the miller, were chargeable with the reparation. *Rex* v. *Kent*, 2 M. & S. 513.

And where turnpike trustees erected a bridge, in pursuance of the powers given them by the act, upon a road where there had been no bridge before, it was held, that the county was primarily liable to keep it in repair, even assuming that the trustees had funds in hand applicable for that purpose. *Rex* v. *Oxfordshire*, 6 D. & R. 231; 4 B. & C. 194, S. C. *Rex* v. *W. R. Yorkshire*, 2 East, 342.

And a new and substantive bridge of public utility, built within the limit of one county, and adopted by the public, is repairable by the inhabitants of that county, although it be built within 300 feet of an old bridge, repairable by the inhabitants of another county, who were bound, of course, under the stat. 22 H. 8, c. 5, to maintain such 300 feet of road, though lying in the other county. *Rex* v. *Devon*, 14 East, 477.

A particular parish was bound by prescription to repair an old wooden foot bridge, used by carriages only in times of flood: about forty years ago, the trustees of the turnpike road built, on the same site, a much wider bridge of brick, which has been constantly used ever since by all carriages passing that way: Held, that to an indictment against the county for not repairing this bridge; a plea that the parish had immemorially repaired and still ought to repair the said bridge, was not supported by evidence of the above facts, and that the burthen of repairing the new bridge must be borne by the county at large. *Rex* v. *Stoney*, 2 Camp. 455.

But where a canal company, authorised by an act of parliament to make the river Bain navigable, and to make and enlarge certain navigable cuts, and build bridges and other works connected with the navigation, having for their own benefit made a navigable cut, and deepened a ford which crossed the highway, and thereby rendered a bridge necessary for the passage of the public, which was accordingly built at the expense of the company in the first instance: the Court held the company bound to maintain it, and that the burthen of repair was not to be

thrown upon the inhabitants of the county. *Rex* v. *Lindsey*, 14 East, 317.

Where certain persons and their successors were authorised, by act of parliament, to make a river navigable and to cut the soil of any persons for making any new channel, and by virtue of which they cut through a highway, and rendered it impassable, and a bridge was built over the cut, over which the public passed, and which had been repaired by the proprietors of the navigation: held, the proprietors, and not the county, were liable to repair. *Rex* v. *Kerrison*. 3 M. & S. 526.

And the Medway Navigation Company being empowered, under a local act (16 & 17 Car. 2) to make the river navigable, and to take tolls, and to amend or alter such bridges or highways as might hinder the passage or navigation, leaving them or others, as convenient, in their room, and they having, forty years ago, destroyed a ford across the river in the common highway, by deepening its bed, and built a bridge over the same place, are bound to keep such bridge in repair, as under a continuing condition to preserve the new passage in lieu of the old one, which they destroyed for their own benefit. *Rex* v. *Kent*, 13 East, 220.

So where the 49 G. 3. c. 84, appointed trustees for taking down the old, and building a new bridge over the river Tone, and empowered them to take tolls, and that it should be lawful for them, out of the monies received, to build a new bridge, &c. and vested the property in the old and new bridge, during the continuance of the act, in the trustees, and that as soon as the purposes of the act should have been executed, then and from thenceforth the tolls should cease, and the bridge, &c. should be repaired by such persons as are by law liable to repair the old bridge: it was held, that during the time trustees were engaged in executing the powers of the act, and before they had completed them, the county was not liable to repair the bridge. *Rex* v. *Somerset*, 16 East, 305.

And when *townships* have enlarged a bridge, which they were *before bound* to repair as a foot bridge, they shall still be liable *prō rata*. *Rex* v. *W. R. Yorkshire*, 2 East, 353.

By the common law, declared and defined by the stat. 22 H. 8, c. 5, and the subsequent bridge act, when the inhabitants of a county are liable to the repair of a public bridge, they are liable to the repair of the highways at the ends of the bridge, to the extent of three hundred feet; and if indicted for the non-repair thereof, they cannot exonerate themselves, except by pleading specially, that some other is bound by prescription or tenure to repair the same. *W. R. Yorkshire* v. *Rex*, 2 Dow. 1; 5 Taunt. 284. S. C.

The sessions are not authorized to order the payment by the bridge master to the clerk of the peace, of a per centage, on all money raised for the repair of bridges in a particular district, in lieu of all his fees for indictments, &c. for bridges within it, although such per centage was claimed as an ancient fee, and had been paid, without dispute, for a long period of time. *Rex* v. *Houldgrea*, 1 B. & A. 312.

No action will lie by an indictment against the inhabitants of a county, for an injury sustained in consequence of a county bridge being out of repair. *Russell* v. *Devon*, 2 T. R. 667.

From the best attention, therefore, I have been able to give this question, I am disposed to venture the following opinion.—That, unless the trustees were authorised to erect the bridge in question by some specific act of parliament, empowering them, either directly or indirectly, to defray the expense of such erection, &c. by levying a toll, or out of some fund made applicable for that purpose, or otherwise, the *county*, and not the *township* in which such bridge is situate, must be at the expense of reparation, *unless* the township can be held responsible by some tenure or custom.

ASPIRO.

NEW BILLS IN PARLIAMENT.

ANALYSIS OF THE LORD CHANCELLOR'S BILL "FOR THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE IN THE HIGH COURT OF CHANCERY IN ENGLAND."

That the office of Master of the *Report Office*, and the offices of Entering Clerks or Entering Registrars, and of Clerk of the Exceptions, and Agent to the Senior Deputy Registrar, shall be abolished; and that there shall hereafter be *six Registrars*, and that each of such Registrars shall have the same authority, and the same duties to perform, and give the same personal attendance, as have heretofore been vested in and executed by the four Sub or Deputy Registrars, excepting as the same shall be altered or varied as after-mentioned; and that Thomas Alexander Raynsford, Francis Benjamin Bedwell, James Christmas Fry, and Edward Dod Colville, Esqrs., the present four Sub or Deputy Registrars, and Joseph Collis and John Francis Le Cointe, Esqrs., the two present Entering Clerks or Registrars, shall be such six Registrars of the said Court; and on the death, resignation, or removal of any of them, the said Thomas Alexander Raynsford, Francis Benjamin Bedwell, James Christmas Fry, Edward Dod Colville, Joseph Collis, and John Francis Le Cointe, the vacancy thereby occasioned shall, unless cause to the satisfaction of the Lord Chancellor shall be shown to the contrary, be filled up by [the appointment of] the senior Clerk in the said office for the time being; and that each of such persons so appointed to be Registrars, and all and every persons and person hereafter to be appointed to be such Registrars, shall be and are hereby authorized and empowered and required personally to do and perform all such matters and things necessary and proper in the due execution of their said offices as belong or appertain thereto, and as have been heretofore done and per-

formed by the Sub or Deputy Registrars of the said Court, excepting so far as the same shall be altered or varied by this act, or by any rules or orders to be made and issued by the Lord Chancellor for the time being relative thereto.

The Registrars to attend the courts according to seniority.

The Senior of the Registrars of the Court for the time being shall act as the *Master of the Report Office*, and shall, in addition to the duties of Registrar, perform all such duties as have heretofore been performed by the Master of the Report Office; provided that the duties imposed upon the Deputy Registrars of the Court, as to checking and signing the notes of the Accountant-General for the payment of money, and the granting certificates for the sale or transfer of bank annuities, or other stocks or funds, or for the delivery of Exchequer orders, India bonds, and other securities, shall no longer be performed by such Senior Registrar, but the same shall be performed by the five other Registrars of the said Court.

The duties of the office of *Clerk of Exceptions* shall be performed by the second Senior Registrar.

That there shall be a Court, to be called "The *Court of the Masters* of the High Court of Chancery;" and that the Lord Chancellor shall annually nominate four of the Masters in Ordinary to be Judges of the said Court for one year: and that three of such Masters shall form the Court, and shall sit once a week, or oftener, as the Lord Chancellor shall direct, in open Court, to hear and determine all such matters, in respect of which jurisdiction is hereby given to the said Court, as shall be brought before them; and that the Lord Chancellor shall, from time to time, appoint some others, or other of the said Masters in Ordinary, to be Judges in the said Court of Masters, as occasion may require, so that there may always be four Judges of the said Court of Masters.

That the said Court of Masters shall hear and determine all applications for time to plead, answer, or demur, for leave to amend bills or withdraw replications, for the production, deposit, and inspection of books, papers, and writings, other than deeds or other documents tending to prove title to any lands, tenements, or hereditaments, all questions of insufficiency, scandal, or impertinence, and all such other matters as the Lord Chancellor, Master of the Rolls, and Vice-Chancellor shall direct; and that no such applications shall be heard or determined by the Lord Chancellor, Master of the Rolls, or Vice-Chancellor, except by the Vice-Chancellor on such cases of appeal to him as are hereby provided for; and that the decision of the said Court of Masters shall be final when the Masters of the said Court shall all concur therein, excepting in such cases, if any, as the Lord Chancellor, Master of the Rolls, and Vice-Chancellor shall specially direct to be subject to appeal to the Court of the Vice-Chancellor; and in case the said Masters of the said Court should not all concur in such decision, then any of the parties shall be at liberty to appeal from the same to the Vice-Chancellor, whose decision thereon, and also on the said matter specially directed to be subject to appeal to him, shall be final.

That no person shall be appointed to be *Chief Clerk* of any Master in Ordinary of the said Court, unless he shall have been admitted on the roll of solicitors, and practised as a solicitor of the said Court for not less than five years, or shall have been a Junior Clerk in the office of one of the said Masters for a like term of five years; and that the Chief Clerk of the Master shall not be removed from his office unless for sufficient cause to be approved by the Lord Chancellor.

That no person shall be compelled to pay to any Master for any *copy* of any paper or document being before such Master, and that every person shall be at liberty to take a copy of such part only of any paper or document being before such Master as he may require: provided that no Clerk in Court or Solicitor, shall be allowed, in the taxation of costs as between party and party, or as between solicitor and client, any charge for any copy of the whole or any part of any such paper or document, unless such copy shall have been paid for to a Master, save as to any such copy as shall have been made for the use of any Master, or by the express desire, or for the use of his own client or clients.

That certain specified *fees* shall be receivable, the said fees being carried to the Masters' fund account; and that the Masters shall receive salaries, to be paid half-yearly out of the monies standing to such last-mentioned account, and to be paid by the Accountant-General as the Lord Chancellor shall direct; and that the Senior Clerks shall receive for their own use the fees specified in the schedule; and that the Junior Clerks respectively shall be entitled to receive, for all copies made in the offices to which they belong, the sum of one penny per folio.

Specified fees only are to be received.

Officers and clerks shall not take *gratuities*.

That it shall be lawful for His Majesty to establish a "Court of Appeal," consisting of the Lord Chancellor, the Master of the Rolls, the Vice-Chancellor, and the Lord Chief Baron of the Exchequer, to hear and determine all appeals made to such Court from the decrees or orders of the Lord Chancellor, the Master of the Rolls, the Vice-Chancellor, and the equity side of the Exchequer, such Court to be called "The Court of Appeal in Equity;" and that such Court shall have such and the like powers of regulating, hearing, and deciding such appeals, and matters relating thereto, as are now possessed by the Lord Chancellor in respect of any appeals to him from the decisions of the Master of the Rolls and the Vice-Chancellor.

That all appeals shall be made by petition to the said Court in like manner as such appeals as last aforesaid may now be made to the Lord Chancellor, subject, nevertheless, to such regulations as may be made in respect thereof by the

said Court of Appeal. Provided, that the Judge from whose decision any appeal shall be made, shall not be one of the Judges to hear and determine such appeal.

That every judgment of the said Court of Appeal shall be signed by the Judges concurring in the same, and enrolled in the same manner and form as the judgments of the Lord Chancellor are now enrolled.

That where the three Judges of the said Court shall concur in the decree to be pronounced in any appeal, then the judgment of such Court shall be final; but where such three Judges shall not so concur, then any of the parties shall be at liberty to appeal to the House of Lords, in the same manner as is now done from the decisions of the Lord Chancellor; and that every appeal to be made to the House of Lords as aforesaid shall be lodged within two years from the date of the decree or order of the Court of Appeal: provided, that nothing herein contained shall prevent any appeal being made as heretofore to the House of Lords from the decisions of the Lord Chancellor, the Master of the Rolls, the Lord Chief Baron, and the Vice-Chancellor respectively.

That it shall be lawful for the House of Lords, from time to time, during the hearing of any appeal from any judgment of any Court of Equity, to direct the attendance of all or any of the Judges constituting the aforesaid Court, in such manner as has been heretofore done with respect to the Judges of the Courts of Common Law.

That from and after the date of the letters patent constituting the said Court, no appeal from any judgment of the Master of the Rolls, or the Vice-Chancellor, shall be made to the Lord Chancellor: provided, that nothing herein contained shall prevent the Lord Chancellor from hearing and determining any appeal which, before the date of such letters patent, shall have been made to the said Lord Chancellor; and that any further appeal from any judgment of the said Lord Chancellor in any such appeal may be made to the House of Lords as heretofore, and not to the aforesaid Court of Appeal: provided also, that nothing herein contained shall authorise any appeal to the aforesaid Court of Appeal in any matter of bankruptcy or lunacy, or in anywise to alter or impeach the authority of the Lord Chancellor in any matter of bankruptcy or lunacy.

That solicitors appointed to any office under this act, shall be struck off the roll.

That examiners shall be authorized to administer oaths to witnesses.

REMARKABLE TRIALS.

No. XIV.

HARRISON'S CASE FOR MURDER.

The following case was tried before Chief Justice *Holt*, on the 6th April, 1692, and is chiefly remarkable as one of circumstantial evidence, and for the identity of the prisoner by the sound of his voice.

It appeared in evidence, that on Monday the 4th Jan. 1692, about nine o'clock at night, two men standing in Fleet-street, at Fetter-lane end, called for a coach, and asked the coachman if he knew Dr. Clenche, in Brownlow-street, Holborn; and when they came there, one of them called to the coachman and bade him go to Dr. Clenche's, and tell him that two gentlemen in a coach, at the end of the street, desired him to go with them to a patient that was sick. Happily, for the discovery of this murder, while the coach stood at the end of Brownlow-street, a young gentlewoman standing at her door near it, and fancying that while the coachman went on the errand the gentlemen would slip out of the coach, she watched them; and a lamp that lighted cross Holborn, over against Brownlow-street end, and another about the middle of Brownlow-street, gave such a light into the coach, that she plainly saw one of the men that sat in it, and saw him look out of the coach after the coachman, and heard him swear at the coachman, because he made no more haste in going to the doctor's house; and she was certain that the prisoner at the bar was the same person, and was more confident of it from the remarkableness of his voice: for she hearing of the murder, and remembering these circumstances, went to Newgate to see the prisoner, and hearing his voice in another room, before she saw him, declared to the persons that were then with her, that the voice she then heard was the person's voice that she saw look out of the coach and swear at the coachman; and afterwards, when she came into the room where the prisoner was, though with several other men, she pointed to him as the person, and she hearing him then speak again, declared to the persons with her, that both by his voice, and by his countenance, she knew him to be the same man.

The circumstances are thus detailed by the Chief Justice, in his charge to the jury:—The prisoner at the bar, Henry Harrison, stands indicted for the wilful murder of Dr. Andrew Clenche, on the fourth of January last. You have heard the witnesses, and upon their testimony, it appears that two persons came to

Brownlow-street end in a coach, after nine o'clock at night, and sent the coachman to the doctor's house, under pretence to get him to a patient, a friend of theirs, that was sick. By this contrivance they got him into their coach, which they had brought for that purpose, and then they ordered the coachman to drive to Leadenhall-street; and when they came about Holborn-Bars, one of them asked the coachman why he drove so slow, and bade him drive faster. When they came to Leadenhall-street, then they bade him drive to the Pye-Tavern without Aldgate, where one of them bade the coachman ask for one Hunt; but he not being there, one of them bade the coachman return back, and gave sixpence to the watch to come through the gate, which was shut in the mean time[a]; and when they came to Leadenhall-market, one of them gave the coachman three shillings and sixpence, and sent him to buy a couple of fowls, which the coachman did buy, and brought them to the coach; but when he came back, he found the doctor in the body of the coach, leaning against the fore seat of the coach, a handkerchief being tied about his neck, with a coal in it, placed upon his wind-pipe; which handkerchief and coal have been produced in Court.

The question is, gentlemen, whether the prisoner at the bar be guilty of this murder? To prove which, there hath been a very long evidence given, some positive, some circumstantial. It has been proved that Dr. Clenche had some dealings with a woman named Vanwicke, and had lent her one hundred and twenty pounds, and had taken a mortgage for it. This prisoner, Mr. Harrison, was a great acquaintance, and very intimate with this woman; and did concern himself in the management of her affairs; and because Dr. Clenche did refuse to lend the woman more money, therefore he had an animosity against Dr. Clenche. [A detail is then given of the negotiation, and of the prisoner's saying of the deceased, he is a great rogue, and deserves to have his throat cut, but let me alone, I will manage him.] A witness further said, that the doctor being pressed to let her have some more money, refused to do it, because she would spend it all upon Harrison.

Then the counsel for the King called some witnesses, who gave an account of the prisoner's shifting his lodging the day before the murder was done. On the Sunday night he came and fetched away his things. The Monday after, being the day that this barbarous fact was committed, he sent a letter to say he was gone out of town; but he left three half crowns to pay for his lodging. But as to his going out of town, it was false, for he never went into the country, but took a lodging in St. Paul's Church-yard. It is observable also, that he went for a parliament-man, and had his footman to attend upon him, &c. There it was that he was seen to have an ordinary handkerchief, and to hold it to the fire; which was taken notice of by the daughter of the landlady, which was not suitable, as she thought, to a parliament-man's quality, but rather fit for a seaman; for it was like the apron of the maid in the house. The handkerchief was shewn in Court, and compared with the handkerchief tied about Dr. Clenche's neck. The witness said it was the same, or very like that which she saw Mr. Harrison hold in his hand. The officer at the Compter proved that the Sunday night, the day before the murder, Mr. Harrison came to Wood-street Compter, and enquired for Mrs. Vanwicke, and that he only was in her chamber, and no other body on that side of the house but Mrs. Vanwicke, the prisoner, and the keeper, who stood at the door, and heard Harrison say, that he would have the blood of that rogue, and named Clenche, or Winch. On the Monday on which this fact was committed, he having taken a lodging at Jones's house, he came thither with a porter, who brought his portmanteau-trunk about eight o'clock at night; and after he had been there a little while, he went away. Another witness stated, that about nine the same night he invited Mr. Harrison to stay and sup with him. Mr. Harrison said, he could not stay, for he was engaged; he must be gone, for that a gentlemen staid in the street for him to go about extraordinary business. The coachman said, that near about that time two men in Fleet-street, near Fetter-lane end, hired his coach of him to go to Brownlow-street to Dr. Clenche's; but he could not positively say that the prisoner at the bar was one of them, but he swore he verily believed that he was one of them. The circumstances as to buying the fowls, &c. were then detailed. After which came the evidence of the prisoner's identity by his voice, as before stated.

There was another piece of evidence, viz., that of a boy, who does not appear; he was examined before the coroner. There has been evidence given of ill practice to take him out of the way, and therefore his affidavit is read for evidence. He swears he saw two gentlemen come out of the coach when it stood in Leadenhall-street, and that having seen the prisoner in Newgate since, doth believe him to be one.

This, gentlemen, is the sum and substance of the evidence for the King, to prove that the prisoner was one of those that committed the murder. You have heard likewise what the prisoner says for himself; he undertakes to prove that he was in another place; (that is) that he should come into Maccaffee's house in Crown-court, over against Serjeant's Inn, in Chancery-lane. And Maccaffee tells you, that there were some other company there, and that Harrison came in very cold, and that they went to cards, and played for one penny a corner at whisk; and that he did continue there from nine till eleven o'clock; and if he was there then, it is impossible he should be guilty of this fact, for the fact was done be-

[a] If the murder had been perpetrated before this time (which is most probable), the discovery might then have been made, and both culprits secured by the gate-keeper, if he had, as the Judge observed, done his duty.

tween the same hours. Maccaffee's wife tells you the same, and they both tell you who were there besides, and who played together, and are positive that the prisoner was there. Baker says, that he went away about half an hour after ten at night, and left Harrison behind him. To confirm this evidence, they have called two other witnesses, besides the drawers at the King's-Head Tavern, viz., Mr. Sutton, the chyrurgeon, who lives in Stonecutter's-street, and Mr. Russel. Mr. Sutton says, they had been at the Horse-Shoe Tavern, in Chancery-Lane, and called for half a pint of sack at the King's-Head Tavern when they came by. And, as they sat in the coach, Mr. Harrison came by accidentally, and one of them looking out of the coach, cries Harry or Harrison; and he went to them, and they drank together another half pint of sack. As to their meeting with Harrison, and as to other passages there, Russel says the same; but as to the time of night he is not positive. And they sent one of the drawers to a house in Crown-Court to inquire for somebody there. The drawers at the King's-Head Tavern say, that Mr. Sutton and Mr. Russel did call there about that time, and that they drank two half pints of wine; and that a man came by with a hanging coat or cloak on, and drank with them. And one of the drawers went to call somebody in Crown-Court; and one of the company up with his muff and gave him a slap in the face. Now this is the sum and substance of the evidence that you have heard on the behalf of the prisoner, to induce you to believe that he was not the person that was concerned in the murder of Dr. Clenche.

To which evidence an answer hath been offered; first, as to those witnesses, Maccaffee and his wife, divers witnesses have been produced to prove, that they are people of doubtful credit; it seems they keep an house of ill fame, a disorderly house, (if you believe the witnesses) you may consider of their credit. And as to Mr. Baker; about nine years since, he was convicted of an arrant cheat, which is no less than forgery, for altering the scavenger's rate for St. Giles's parish, and therefore the less credit is to be given to his evidence, for now it appears that he is a knave upon record; and the very record itself was produced against him, which is true without doubt, notwithstanding his pretence of innocency. What is said by Mr. Russel and Mr. Sutton, I must leave to your consideration; they had been drinking, and the drawer says, they were at the King's-Head Tavern at the eleven of the clock at night. Mr. Harrison, the next day after the murder, met a gentleman at Joe's coffee-house, in Salisbury-court; and though he had taken a lodging in Paul's Church-yard, yet he said that he was newly come to town, and had been in Kent, and had remained there about three weeks; and that he wanted a laundress and a lodging, although he had not been out of town, and had taken a lodging but the day before. And then he told the witness, who discoursed with him about the death of Dr. Clenche, that he had formerly loved him, but he said he had been of late a barbarous rogue to a poor gentlewoman, a friend of his; and that the just judgment of God had fallen upon him for so doing, and that he would write to her to give her an account of it; and advise her to write to Mrs. Clenche, and to tell her that she was a widow now as well as Mrs. Vanwicke; and he thought by that means to move Mrs. Clenche to pity her, being a widow as well as herself. And that whilst they were talking thus, one Mr. Ravenscroft tells him that Dr. Clenche was murdered, and that a bully of the town, that belonged to a gentlewoman in the Compter, one Mrs. Vanwicke, was suspected. At which Mr. Harrison was much startled, and said, that no one was concerned with that gentlewoman but himself; and, for ought he knew, he might be taken up for it. This is that which he said. It is most plain, if you believe the witnesses, that Mr. Harrison was concerned for this woman Vanwicke, and hath threatened Dr. Clenche, called him rogue and rascal, and said that he deserved to have his throat cut; that Harrison went under a disguise for some time before the murder. You have had an account of the handkerchief, what kind of handkerchief Harrison had, and what handkerchief was taken about Dr. Clenche's neck, you have seen; and you heard what evidence was given by Mr. Humston; how the prisoner was with him about nine o'clock that night; and how he refused to stay and sup with Mr. Humston. If Mr. Harrison had no earnest business, one would have thought he might have staid with Mr. Humston, better than to have gone to an alehouse, in Crown-court, and played at cards at one penny a-piece a corner; he might have had better fare no doubt. The witnesses for the prisoner say for him that he came to Maccaffee's house about nine o'clock at night, and staid till eleven. That is contrary to that evidence given for the King, viz., that he was in the coach at Brownlow-street end; for if he was at Maccaffee's house all the time they mention, it is impossible he should be guilty. All these things are under your serious consideration.

The jury withdrew for half an hour; and, when they returned, gave the verdict, "Guilty of wilful murder."

Sentence was passed the last day of the session, and the prisoner was afterwards executed.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

BANKRUPTCY.—ASSIGNEES.—EXPENSES.

There is no general rule that the travelling expenses of a bankrupt's assignees should be at all times paid out of his estate. If the journeys are undertaken bonâ fide *in respect of the estate, the expenses are to be allowed; but if the assignees have other objects in making the journeys than on account of the estate, the expenses are to be*

cut down, and an inquiry for that purpose is directed before a master.

His lordship gave judgment in this case, which arose out of the commission of bankruptcy issued in the case of *Joyners*. The question to be decided was one of great and general importance, namely, whether or not assignees were entitled to have their travelling expenses paid out of the bankrupt's estate. The defendants in this case were the assignees to Messrs. Joyners, late bankers at Romford. They resided in the neighbourhood of Romford, and charged the sum of 100*l.* for travelling expenses, at different times, to and from London, in respect, as they alleged, of the bankrupt's affairs. The claim was resisted, on the ground that the assignees did not come to London on business solely connected with the bankruptcy; and counsel were heard and affidavits read on both sides. If the journeys were *bond fide* undertaken for the benefit of the bankrupt's estate, it was proper that the expenses should be allowed; but it would not do to lay it down as a general rule that the travelling expenses of assignees should at all times be paid, as such a rule would be opening a wide door to abuses and unnecessary expenses. But, on the other hand, he did not wish to draw the line too close, as the affairs of the bankrupt might suffer from so doing. He would, therefore, refer the case back again to the Master to ascertain what journeys had been undertaken for the benefit of the estate solely, as the expenses of other journeys, or on other business, could not be allowed. *Ex parte Joyners, in re Joyners.* Sittings in Lincoln's Inn, after Trinity Term. L. C.

INJUNCTION.

A special injunction is issued to restrain the publication of a work, which is clearly a piracy of the plaintiff's work, although the Court is of opinion that the pirated work is not calculated to lessen or interfere with the sale or profits of the other.

Sir *Edward Sugden* applied, on the part of the plaintiff, for an injunction to restrain the defendants from printing and publishing a work which they called "a *Conspectus of the Butterflies and Moths to be found in Great Britain.*" In support of this application, he read the affidavit of the plaintiff, who therein stated that he had published, and was still proceeding with, the publication of a work, which he entitled "*A Synopsis of the Indigenous Insects of Great Britain;*" and that from this work the defendants pirated the whole, or certainly the principal part of, their publication. He contended, that there could not be a doubt that the defendant's work was a piracy, as they confined their descriptive powers to those insects that had been already described in two volumes, published by the plaintiff; and when those were exhausted, they had no resource of their own to fall back on, but were at a dead stand, until the plaintiff's next volume should come out to reinforce them. A single glance at the several works must satisfy his Lordship of the propriety of granting this injunction; for, in one part of the plaintiff's work, where he describes a certain insect—by mistake—as distinguished by *occuli nudi*, the defendants, copying that mistake, described the insect in the same manner, only translating the Latin words into English. In another part of the plaintiff's work, where a description of the insect *syenna* had been given, by another mistake, under the head of *scoria*, the defendants, copying that also, made their piracy too palpable; and it was useless for them to pretend that they only took a few extracts from the work, for there was a piracy throughout, and not only of parts.

The *Lord Chancellor*, having the two works before him, said, that he found that the defendants, in their book, strongly recommended the plaintiff's work.

Sir *Edward Sugden.*—No wonder; no one understood its value better; and in recommending that, they were passing a compliment on their own.

The *Lord Chancellor*, after some consideration, granted the injunction, observing, that he was sure that he should hear more about it. The works seemed to be intended for different classes of persons; the plaintiff's for scientific men, who could afford to pay 1*l.* 11*s.* 6*d.* for it, with which the work of the defendants, being evidently from its price and form, for popular sale, could not, in his Lordship's opinion, interfere. *Stephens* v. *Rennie and another.* Sittings at Lincoln's Inn, after Trinity Term. L. C.

KING'S BENCH.

[Before the Four Judges.]

OVERSEERS' ACCOUNTS.—MANDAMUS.

One overseer is not liable for the malversation of another. Where one overseer has acted for another, and the latter has not recognized him as an agent, the Court will not issue a mandamus *to compel justices to grant a warrant of distress on the goods of the latter for the defaults of the former, during the time of his acting for the latter. Before the Court will grant a* mandamus *to compel justices to grant a warrant of distress against the goods of an overseer, supposed to be a defaulter, the exact amount of the sum deficient must be stated.*

A rule had been obtained, calling on two of the justices of the county of Essex to shew cause why a *mandamus* should not issue, commanding them to grant a warrant to levy by distress and sale of the goods of a person named Peppercorn, the sum of 319*l.*, being the balance remaining in his hands as one of the overseers of the parish of Woodford. Wood and Peppercorn were appointed overseers of the poor of the parish of Woodford, in which parish it had always been the custom for one overseer to act during the first six months, and the other during the last six. Wood acted for the first six months, and then offered to continue to the end of the year. Peppercorn consented, and Wood collected all

the rates and performed all the duties of overseer to the end of the year. Peppercorn never collected any money whatever, nor in any way interfered in the affairs of the parish, nor delivered any accounts. Wood alone rendered his accounts, which were entered in the parish book and signed by Wood. At a vestry meeting one of the parishioners present asked Peppercorn to sign the book, which he at first refused, saying, that he knew nothing about the accounts; but after being told that they could not proceed without his signature, he signed the book thus: "I believe the above accounts to be correct. P——." Peppercorn afterwards refused to verify the accounts upon oath before the justices, who struck out Peppercorn's name, and made an entry that the accounts were allowed on the oath of Wood alone. Peppercorn denied having made any promise of remuneration to Wood for performing the duties of overseer during the last six months. Wood was insolvent.

Thesiger shewed cause. This Court will not grant a *mandamus*, as Peppercorn is not liable for the miscarriages, defaults, and enveiglements of his colleague. *Rex* v. *The Justices of Gloucestershire*, 1 B. & Ad. 1. Peppercorn has not rendered himself liable by affixing his signature to the accounts, as he denied throughout that the accounts were his, and only signed them at the request of a parishioner. The application is premature, as by the 50 G. 3. c. 49, the justices, in case of the refusal of an overseer to verify his accounts upon oath, are to issue a warrant of distress. Peppercorn's signature to the accounts cannot render him liable, as that would be to make him liable for the debt of another, for which there was no consideration. Wood was not Peppercorn's agent, as it is sworn, by both Peppercorn and Wood, that no remuneration was given or promised. At all events, Peppercorn cannot be liable for the deficiencies in the accounts during the first half year, when Wood acted for himself. The parish are endeavouring to make Peppercorn responsible for the deficiencies of the whole year, 31*l.*; whereas not more than half that sum can be considered as deficient upon the last half year's account.

Scarlett and *Tomlinson*, *contrà*. The justices are not bound, by the 50 G. 3. c. 49. § 1, to require the overseers to verify their accounts upon oath. The words of that act are, "Such justices are hereby authorized, if they shall think fit, to examine into the matter of every such account, and to administer an oath, &c." Wood was clearly Peppercorn's agent. Wood offered to perform the duties of overseer, and Peppercorn accepted the offer. If Peppercorn had employed any other man, Peppercorn would have remained responsible to the parish. Is the parish to lose the benefit of Peppercorn's responsibility, because he employs the other overseer? By signing the accounts, Peppercorn has adopted the acts of Wood, and recognized him as his agent. It has never been decided, whether an overseer is liable for the contracts of the other; but from the case of *Astle* v. *Thomas*, 2 B. & C. 271, it appears that churchwardens are jointly liable.

Per Curiam.—This rule must be discharged. It is clear that where there are two overseers for a parish, one is not answerable for the malversation of the other. It can only be contended that Peppercorn made himself liable by signing the account, which was originally without his signature, at the instance of a parishioner of the vestry. The 50 G. 3. c. 49, § 1, does not render it imperative on the justices to require the overseers to verify their accounts upon oath. The justices, in this instance, did require an oath, and Peppercorn very properly refused to swear, as Wood alone had managed the concerns of the parish the whole year. It was suggested, that Wood had acted as Peppercorn's agent; but Peppercorn swore that Wood was not his agent, and that he had neither promised him, nor paid him, any remuneration. The signature of Peppercorn to the accounts is not sufficient to induce us to say that he shall be liable for the malversation of his brother overseer. It was never pretended that Peppercorn received any of the parish money.

Parke, *J.*—I doubt whether Peppercorn might not be considered liable for the last half year; I am not sure whether Wood was, or was not, Peppercorn's agent during that time; but before we grant a *mandamus*, we ought to know how much is due to the parish out of the money collected in that half year during which Wood may have been supposed to be Peppercorn's agent.

Rule discharged.—*Rex* v. *The Justices of Essex*, June 16th, 1832. K. B. F. J.

KING'S BENCH.—PRACTICE COURT.

AFFIDAVIT OF MERITS.—SHERIFF.—BAIL.—ATTORNEY.

The Court will not set aside proceedings against the sheriff, on an affidavit of merits, made by an attorney, which only states, that "he verily believes a good defence may be made to the action by the defendant, on the merits."

White shewed cause against a rule for setting aside proceedings against the sheriff. The affidavit of merits was made by the agent of the defendant's attorney, and it stated "that he has the entire management of the cause, and he verily believes a good defence may be made to this action by the said defendant, on the merits." That, he submitted, was not sufficient.

Thunton, J.—That will not do. There may be good reasons for the party not wishing to swear positively that he has a good defence on the merits.

Rule discharged.—*Rex* v. *The Sheriff of Middlesex*, May 9, 1832. K. B. P. C.

FEME COVERT.—ARREST.—HUSBAND AND WIFE.

A married woman who gives a warrant

attorney in her own name, cannot be taken in execution: and if arrested, the Court will relieve her summarily, though the creditor was wholly ignorant of her marriage.

Hutchinson shewed cause against a rule obtained by *Campbell*, for discharging a married woman out of custody, and for setting aside a warrant of attorney. It appeared from the affidavits, that in 1815 she married a man of the name of Stock, who soon after left her in Ireland. Some time afterwards she came to England, and passed by the name of Beaufort. Whilst she was so residing in England, she was arrested, and ultimately, in order to stay proceedings, gave a warrant of attorney for the debt and costs. Having been divorced by act of parliament, she married a Mr. White, her present husband, and was soon after arrested on a *pluries ca. sa.*, upon a judgment entered upon the warrant of attorney. In answer to the rule, it was sworn, that the arrest was for 60*l.* laid out by the plaintiff for her use: that the plaintiff had no knowledge whatever of her being a married woman, and that she had represented herself to have 400*l.* a year. Under these circumstances, he contended, that she must be considered as having acted as a *feme sole*; and he cited an anonymous case in 1 Salk. 400, to show that the Court would not relieve in a summary way, a *feme covert* who acts as a *feme sole*, and gives a warrant of attorney, but would put her to her writ of error. He also cited *Maclean* v. *Douglas*, 3 Bos. & Pul. 128, to the same effect, and the Court there left her to her writ of error; also *Cooper* v. *Hunchin*, 4 East, 521, where the same distinction was taken. He contended that the giving a warrant of attorney in a false name, instead of her husband's, was of itself a fraud. [*Patteson*, J.—If she is entitled to a writ of error, why should we not relieve her in a summary way?]

Hutchinson said, that error, perhaps, would not relieve her; that he did not know how she could bring a writ of error, having given the warrant of attorney in another name.

Campbell, in support of the rule, said it was quite clear that the judgment and warrant of attorney were void. He cited the case of *Saunderson* v. *Marr*, 1 H. Bla. 75, that a warrant of attorney given by an infant is void, and said that it was equally void when given by a married woman; and that a deed executed by a married woman, in a name different from her own, is void. He urged, that since the case of *Marshall* v. *Rutton*, 8 T. R. 545, the true distinction was, that if she had not misrepresented herself, she was entitled to be relieved: her going by another name was no evidence of her representing herself as a *feme sole*, and it was not sworn on the other side, that she had ever made one single representation to that effect.

The Court made the rule absolute for discharging her out of custody, and for setting aside the judgment, and held that there was no reason for putting her to her writ of error, it being admitted that she was married when she gave the warrant of attorney.

Rule absolute, without costs.—*Selby* v. *White*, June 8, 1832. K. B. P. C.

NOTES OF THE WEEK.

THE LORD CHANCELLOR'S CHANCERY COURT BILL.

We have given in the present number a summary of the Bill "for the Improvement of the Administration of Justice in the High Court of Chancery." We have omitted the subordinate arrangements and the minor details. Our readers will now readily collect the general scope of this important measure. We shall take an early opportunity to direct their attention to the several parts of the plan, and particularly to the *Masters' Court*, and the *Court of Appeal*.

The Masters' Court is intended, we observe, in some respects, to perform duties corresponding with those of a Judge at Chambers in the superior Courts of Common Law. On the subject of the Court of Appeal, we had prepared some remarks, arising from the late Mr. Bentham's recent pamphlet, which has been sent us by a friend, and which, we need not say (in spite of its peculiarities of expression) is entitled to the greatest attention. The departed sage is for "*single seatedness*" in a court of justice; and he assigns upwards of a score of reasons in its preference over a plurality of judges.

The proposed arrangements and alterations in regard to the Registrars of the Court, and the Masters' Clerks, fees and gratuities, will deservedly attract the notice of all our practical readers.

In addition to the analysis, we may observe, that the six Registrars proposed to be first appointed are Mr. Raynsford, Mr. Bedwell, Mr. Fry, Mr. Colville, Mr. Collis, and Mr. Le Cointe. The six Clerks to the Registrars are to be Mr. Walker, Mr. Bicknell, Mr. Standen, Mr. Hussey, Mr. Bedwell, jun., and Mr. Munro; and, as Assistant Clerk, Mr. Colville, jun. In the case of a vacancy amongst the six, the latter is to be promoted, and the office of Assistant Clerk abolished.

On all future vacancies in the office of Sixth Clerk to the Registrars, some person who has been admitted and entered on the roll of *solicitors*, and has practised as such solicitor, is to be appointed. The number of years during which such solicitors shall

have practised, is not stated. This will probably be fixed at five years, as in the case of the Chief Clerk to the Masters.

The several Schedules, which are at present not printed, will form one of the most essential parts of the Bill. They are to contain the list of authorized *Fees* to be received by the Registrars and the Masters' Clerks.

The proposed *salaries* of the Masters and Registrars, and their respective Clerks, are not inserted in the Bill.

REAL PROPERTY REPORTS.

Having, in several recent numbers, and in the Monthly Record for August, put our readers in possession of the last Real Property Report, and having reviewed the Second Report (vol. I. p. 22) which related to a General Registry for Deeds, and from time to time noticed the arguments for and against that measure, we have been induced, in order to complete the series, to print the First Report, in the Record for September.

The merits and great importance of the First Report are too well known to need any comment—not only as bearing on the measures of improvement as to Curtesy, Dower, Inheritance, Fines and Recoveries, and Prescription, which are still under parliamentary consideration—but as embodying, in a readable form, the principal part of the learning on the subject.

ANSWERS TO QUERIES.

LAW OF PROPERTY AND CONVEYANCING.

DEVISE.—ANNUITY. P. 304.

The testator, after giving 700*l.* to the "issue" of his daughter, describes such issue by stating "if more than one *child*," &c.; thereby defining his understanding of the word "issue." See *Sibley* v. *Perry*, 7 Ves. 522, where the Lord Chancellor held, that the words "respective parents" restricted the meaning of the word "issue" to children. It would seem, therefore, that *D.'s* son will be entitled, on the death of his mother, if he survive her and be the only child then living, to the whole 700*l.*; and consequently, that the grand-daughter takes no interest. J. B. T.

LEASE.—PARTNERSHIP. P. 320.

A. B. and *C. D. only* are liable *to the lessor*, under their covenant in the lease. *E. F.* can only be liable to *A. B.* and *C. D.*; and the nature of such liability must depend on the partnership accounts. J.

COMMON LAW.

BANKRUPTCY.—ACTION. PP. 271 & 302.

With deference to J., there can be and is *great* doubt, as to the necessity of joining the official assignee as a plaintiff, in an action by the assignees. The 22d section of 1 & 2 W. 4. c. 56. states, that the property of the bankrupt shall be "possessed and received by such official assignee alone;" but the 25th section enacts, that the property shall vest in the "assignees or assignee" for the time being; and it is submitted, that the official assignee is only made the receiver to the estate for safe custody, but that the legal estate in the property is in the creditor's assignees only; otherwise, the official assignee might be rendered liable to the costs of an action in which his name might be used without any controul by him over the solicitor to the creditor's assignees, which is expressly taken from him.

J. B. T.

TENDER. P. 319.

Undoubtedly a tender may be refused on the grounds stated by J. A. M., and they will be matter of evidence at the trial. The better way is to refuse the tender generally, without assigning any grounds, and then you will be at liberty to bring forward any evidence at the trial, which will destroy the tender. See Lord Raymond, 1744; and Tidd's Practice. J.

TITHES COMPOSITION. P. 319.

The time to which the payment would clear the farmer against the rector would, of course, be matter of evidence, there being no written agreement; but I should think it would be up to Michaelmas, the period when the composition appears to become due. The composition being only by parol, I doubt whether it was binding. See 2 Bos. & Pul. 172. It certainly will not bind *the successor*, who will be entitled to the tithes from the death of the previous incumbent. See *Williams* v. *Powell*. 10 East, 269. J.

LAW OF LANDLORD AND TENANT.

DISTRESS BY EXECUTORS. P. 320.

I think the executors of a landlord seised in fee, fee tail, or for life, may distrain for arrears of rack-rent. See note 7 to 162 b. of Co. Litt., where he says, "Note, *all manner* of arrearages of rent issuing out of a freehold or inheritance are within the statute." I am not aware of any modern decisions supporting this; but the statute being remedial would, I suppose, receive a liberal construction. I doubt whether it extends to terms of years; as to which, see Woodfall, 297; Bull. N. P. 57. J.

QUERIES.

COMMON LAW.

AFFIDAVIT OF DEBT.—DRAWER.

Am I to understand by the case of *Benting v. Judis*, reported in the Legal Observer of Saturday last, p. 317, that in an affidavit of debt it is necessary it should be specifically stated, that the acceptor has dishonoured the bill, and that the usual words, "and which said bill of exchange is now due and unpaid," alone are insufficient? AN ATTORNEY.

WASTE.

Will any of your readers say if there is any, and what act of parliament, authorising the owners of land adjoining highways to enclose pieces of waste lying between them and such highways? or in whom is the fee of such wastes vested? W. M.

LAW OF PROPERTY AND CONVEYANCING.

LIFE INTEREST.—RESIDUE.

A. B., after giving certain pecuniary bequests, and among others, a legacy of 20*l.* to each of his executors, goes on as follows: "The residue of my funded property, leasehold and otherwise, I place in the hands of my executors (naming them), to sell, dispose, or retain, as they deem fit, to pay by quarterly instalments unto *C. D.*, *E. F.*, and *G. H.*, that is to say, all the rents and interest that will arise from the principal, save and except" 4*s.* a week, which is to be paid to *I. K.* Have or not *C. D.*, *E. F.*, and *G. H.*, a life, or what estate, in this residue? And if only a life estate, who is entitled to the residue, after the death of the survivor,—the next of kin of the testator, under the 1 W. 4. c. 40. § 1, or the executors, they having power to sell, dispose, or retain, as they deem fit. J. H. C.

LOPPING TREES.

S., a leaseholder, is annoyed by drippings from the trees of a neighbour, also a leaseholder. Is he justified in cutting off all the branches which overhang his ground, without notice to the landlord of the adjoining ground, or to his tenant, to remove the nuisance? If he can safely remove the branches, either before or after notice, to whom do the loppings belong? and who is entitled to the fruit overhanging the premises of *S.*, growing on such of the trees as bear fruit?

Cujus est solum ejus est usque ad cœlum.

LAW OF LANDLORD AND TENANT.

EJECTMENT.—ACCRUING RENT.

Pending an ejectment by landlord against tenant, can the landlord distrain for rent accruing due pending such action? W. H.

MISCELLANEA.

A correspondent observing in No. 84 of the present volume, a copy of a bill for a fine levied in E. T. 1655, has forwarded a bill for a fine levied about 35 years earlier, and in Latin, copied *literatim*; and observes, that some of the charges are the same as at the present day; for instance, Chirographer 5*s.* 8*d.*[a]

Literatim copy of a Bill for a Fine levied in Easter Term, 18th James 1st.

Pr Pasch. xviij° Jac. Regi.

Pr tract. pr. & cpn.	iij^{s}
Pr bre. con. & sigillo	ij^{s} vj^{d}
Pr sign.	iiij^{d}
Pr indorsam.	iiij^{d}
Pr intr.	vj^{d}
Pr compo.	vj^{s} viij^{d}
Pr ded. potest.	ij^{s} vj^{d}
Pr retorn. inde.	xvj^{d}
Pr fine ded. potestat.	iij^{s} viij^{d}
Pr warr. attorn.	iiij^{d}
Pr retorn. bre. con.	ij^{s}
Cust. br.	iij^{s} viij^{d}
Pr intr. argent. reg.	xiiij^{d}
Cir.	v^{s} viij^{d}
Clio. ibm.	iij^{s} vj^{d}
Pr feod.	v^{s}
Sum. total.	x^{l} v^{s} ij^{d}

[a] Will any of your readers oblige me by explaining why, in the old chirographs of fine, the year of the King is stated, not *anno regni*, but *anno regnor.*—and when the custom began of prefacing the King's reign with "*post conquestum*," why first adopted, and when it ceased. It certainly did not continue so long as the use of Latin records; as it is omitted in the chirograph of the fine connected with the above bill of costs. I have also a deed poll of release, and bond for quiet enjoyment of the estate, both in Latin, and dated as follows: "*Dat. vicesimo nono die mensis Novemb. anno regni Regis Henrici Septimi, post conquestum sexto decimo.*" This release contains the *his testibus* clause, with the witnesses in the body of the deed, is duly sealed, but has no signature nor attestation. L. M.

The Legal Observer.

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——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

DISSERTATIONS ON THE LAW OF SCOTLAND.

No. II.

THE SUPERIOR COURTS OF SCOTLAND.

THE Scotch House of Lords was formerly the Supreme Appellate Court of that country; and since the union, the House of Lords of the United Kingdoms of Scotland and Ireland, has taken its place. So likewise, the Privy Council of Scotland, formerly an important and powerful Court, has since that period merged in the English Privy Council, and has ceased to have a distinct and separate existence. Of these two Courts, and their powers and officers, it is here unnecessary to speak, as they are sufficiently well known to the English reader. It is our present purpose to mention only those Scotch Courts, the jurisdiction of which relates to Scotland alone, and which are peculiar to that country.

The first of these is the *Court of Session*, which was created in the year 1425. It has suffered very considerable modifications and changes since its creation. It was formerly composed one-half of laymen, and one-half of churchmen; but since the year 1640, it has consisted exclusively of laymen. The Judges, now called Lords of Session, are nominated by the Crown, and their number and rank have been regulated by several recent statutes.

By st. 48 G. 3. c. 151, the Court was divided into two chambers, the Lord President, with seven of the Ordinary Lords, forming the first division, and the Lord Justice Clerk, with six of the Ordinary Lords, the second division, four Judges in each division being declared a *quorum*. By stat. 50 G. 3. c. 112, the three ordinary Judges of the first division, and the two ordinary Judges of the second division, were relieved from attending in the Inner House, and appointed to sit, as permanent Lords Ordinary, in the Outer House, the *quorum*, in either division, being then diminished to three: and by the 53 G. 3. c. 64, several minor alterations are also made.

The Judges of Session must be at least twenty-five years old, and must have served as an advocate or principal clerk of session for five years, or as a writer to the signet for ten. If an improper person be appointed, the existing Lords of Session have the unusual power of being able to make a remonstrance against the appointment; they must, however, submit, if it be persisted in.

The Judges have some privileges which are almost peculiar to the Judges of Scotland. As a part of the College of Justice, (which includes also advocates, clerks of session, writers to the signet, and all other members of the Court,) they may decline the jurisdiction of every inferior Court, with one exception[a]; and are also exempted, in general terms, from all taxes and contributions. This general immunity does not, however, extend to the land tax.

[a] This is the Small Debt Court; 39 & 40 G. 3. c. 46. § 19.

The jurisdiction of the Lords of Session is supreme in degree. Their sentences are subject only to be reversed by the House of Lords. They can review their own decrees, and set aside and suspend those of all inferior Courts, in civil causes, unless where their power, in this respect, is restricted and controuled by some particular statute.

Not only, however, is their jurisdiction supreme in its nature, it is also universal in its extent. It is expressly declared to extend to all civil causes; and though private right or property is, without doubt, the chief and most proper subject of their jurisdiction, they are also competent, says Erskine [b], to several questions which carry no pecuniary or patrimonial interest, *ex. gr.* to elections of magistrates of boroughs, of commissioners of supply, &c.; and have, by virtue of special statutes, the only cognizance of all complaints against sheriffs or clerks to elections, for making false or undue returns.

There are two ways of bringing matters before the Court of Sessions. Where the action is of uncommon importance, it is brought, in the first instance, before it. Thus declarators of property in heritage, and other competitions of heritable rights, restitutions of minors, reductions of decrees and deeds, judicial sales of estates of minors and of bankrupts, &c. are commenced originally in the Court of Session; but where the action relates to a comparatively trifling matter, they must be first commenced in an inferior Court, the parties having the privilege to appeal from its sentence, and thus obtain the opinion of the Court of Session. By the 50 G. 3. c. 112. § 28, it is enacted, that no action shall be brought in the Court of Session for any sum under twenty-five pounds, except actions in which members of the College of Justice are either plaintiffs or defendants, and in actions of debt due to merchants and others, in boroughs, for goods sold by them to such as dwell not within the county where the goods are furnished.

The Court of Session has not merely a civil jurisdiction—several criminal causes fall under its cognizance; first, by the positive enactment of statute, as in cases of fraudulent bankruptcy, of false imprisonment, &c.; next, in all criminal matters incidental to the complete disposal of civil matters. Thus, as it has sole cognizance over all matters relative to deeds, it exercises a power of judging, both in forgery and usury, when these crimes relate to deeds. It has also other criminal jurisdictions; which, however, are rarely exercised, it being found more convenient that all criminal matters should be tried in those Courts whose jurisdiction is confined to their trial. Indeed, by degrees, the power of the Court of Session in criminal matters has been transferred to the Court of Justiciary; and it seems now settled, that in all proper criminal cases, a power of review lies exclusively in the latter Court.

The Court of Session is not tied down by the strict letter of the law; it is as well a Court of Equity as of Law, and there is no separation, as in England, of these two branches of jurisprudence. This equitable power in the Judges is called the *nobile officium*, and gives a very varied and extensive authority to the Judges of Session; as by virtue of it, they may direct inquiries into facts and things to be done, that cannot be demanded as a matter of right. Thus they frequently ordain, *ex officio*, a party to be examined, though his adversary, who declines referring the matter in issue to his oath, has no title to insist on such examination.

Besides having judicial, the Lords of Session have also ministerial powers. These, however, are rarely exercised, and never, except on extraordinary emergencies.

The second great Court in Scotland, is the *Court of Justiciary*. It is the supreme criminal Court of the kingdom; and its judgments, whether interlocutory or final, are not subject to revisal, either by itself or by any other tribunal, not even excepting the House of Lords [c].

This Court is now fixed in Edinburgh; but from it are derived the Circuit Courts. Its present form is as old as the year 1672. This Court is comprised of the Justice General, the Justice Clerk, and five Judges of the Court of Session, specially summoned by the King; the Justice General being constant president, and in his absence, the Justice Clerk. By the stat. 23 G. 3. c. 45, the *quorum* is declared to be three, both in session and vacation.

The kingdom, for the purposes of the administration of criminal justice, is divided into three districts; and circuits are held in spring and autumn, by two of the Commissioners, at Dumfries, Jedburgh, and Ayr;

[b] Book I. tit. 3. p. 59.

[c] 2 Hume, 486. *Murdison* v. *Miller*, 10th March, 1773. *Robertson* v. *Berry*, 8th May, 1793.

by two at Sterling, Glasgow, and Inverary; and by two at Perth, Aberdeen, and Inverness.

The jurisdiction of the Court of Justiciary extends to all, and especially to high treason, and what are called the four pleas of the Crown, robbery, rape, murder, and arson. By an act of 20 G. 2, amended by 54 G. 3. c. 67. § 5, the Circuit Courts of Justiciary have also a supreme civil jurisdiction, by way of appeal from any inferior Court which lies within the district of their circuit, where the subject does not exceed twenty-five pounds. In cases of difficulty, the Circuit Judges are to report their proceedings, and their reasons of doubting, to the Court of Session or Justiciary respectively, as the cause happens to be civil or criminal.

The *Court of Exchequer* had jurisdiction over all matters relating to the King's revenue. Its Judges were the High Treasurer of Great Britain, nominally; a Chief Baron, and four other Barons, who might be taken either from the English or Scotch bar, if of five years standing. These Judges had all the privileges of the College of Justice.

Its duties were merely confined to matters of revenue, and these were considered no longer to need a separate tribunal; and a bill was therefore introduced into the House of Lords by the present Lord Chancellor, for the purpose of abolishing this Court, after the decease or retirement of the present Judges, and transferring its jurisdiction to the Court of Session, which bill has passed into law, 2 W. 4. c. 101.

The next Court which we shall mention is the High *Court of Admiralty*. The jurisdiction of this Court extends to all maritime causes, both civil and criminal, and is exclusive in the first instance, both of the Courts of Session and Justiciary.

By two late acts, 55 G. 3. c. 42, and 59 G. 3. c. 35, a new Court was introduced into Scotland, for the purpose of deciding civil causes by trial by jury. It is composed of one Chief Judge, and two other Judges, and called the Lords Commissioners of the *Jury Court* in civil causes. No action can originate in this Court; it derives its authority by virtue of remits from the Court of Session, and the Court of Admiralty.

These are the existing superior Courts of Scotland. There were formerly several others, enjoying important local powers; but they have either been directly abolished, or have sunk into disuetude.

PRACTICAL POINTS OF GENERAL INTEREST.

No. XXXII.

POST-OFFICE LETTERS.

THE following case is new, and of some interest:—

Letters having arrived at a post-office, addressed to a party who had become bankrupt, the assignee (in that character) demanded them of the postmaster; and he believing, *bonâ fide*, that the assignee was entitled to have them for the purposes of the commission, delivered them up; this having been the practice of the office, under similar circumstances, for more than thirty years. The question was, whether the postmaster was liable, under the act 9 Anne, c. 10. s. 40, for *wittingly, willingly, and knowingly* detaining letters, and causing them to be detained and opened. Lord Tenterden, C. J. decided that he was not. The words "wittingly, willingly, and knowingly," in this penal clause, must have been introduced with some view. If we suppose them to have no particular meaning, it would have been sufficient without adding more, to impose the penalty on any person opening or detaining letters, or suffering them to be opened or detained. Then if these words have a meaning, we must look for the explanation of them, first, to the preamble of the clause in question; and that recites that *abuses* may be committed by wilfully opening, embezzling, and detaining letters. The enacting part states what shall be the consequence of so doing;—namely, that the person so *offending*, or *who shall embezzle any letter*, shall, for every such offence, forfeit 20*l*., to be recovered by a *qui tam* action; and over and above such penalty, shall be for ever incapable of exercising any office, trust, or employment, in or relating to the Post-office. Now, in the interpretation of an act so highly penal on the party *offending*, we must be careful to adopt such a construction as will strictly answer to the intention expressed by the legislature; and so construing the clause in question, it seems to me that the words, "wittingly, willingly, or knowingly," must be taken to denote acts done with a conscious mind that the party is doing wrong. If so, it is clear that the plaintiff cannot recover; for the case states, that in delivering up these letters, the defendant acted *bonâ fide*, under an impression that he was performing his duty, and he might think himself warranted in that opinion by the practice which had prevailed for thirty or forty years. The other Judges concurred; *Meirelles* v. *Banning*, 2 B & Ad. 909.

Number of Persons charged with Criminal Offences who were committed to the different Gaols in England and Wales, for Trial in each County, in each of the Three last Seven Years.

	In the Seven Years ending with the Year 1817.	In the Seven Years ending with the Year 1824.	In the Seven Years ending with the Year 1831.
Anglesea	12	39	66
Bedford	220	677	794
Berks	659	1,114	1,365
Brecon	105	132	123
Bucks	371	762	1,258
Cambridge	370	816	1,096
Cardigan	33	83	57
Carmarthen	78	200	216
Carnarvon	43	105	139
Chester	1,168	2,132	3,273
Cornwall	415	659	955
Cumberland	303	378	438
Denbigh	87	154	205
Derby	488	708	1,120
Devon	1,691	2,616	3,057
Dorset	464	766	1,091
Durham	329	519	893
Essex	1,423	2,412	3,310
Flint	45	90	145
Glamorgan	164	246	445
Gloucester	1,450	2,254	3,203
(Bristol)	652	1,098	1,140
Hants	1,688	2,201	2,724
Hereford	604	794	908
Herts	568	890	1,461
Huntingdon	126	217	280
Kent	2,261	3,562	4,399
Lancaster	7,255	12,538	15,582
Leicester	607	1,164	1,518
Lincoln	888	1,474	1,952
Merioneth	28	37	34
Middlesex	13,415	18,272	23,727
Monmouth	185	356	629
Montgomery	116	190	197
Norfolk	1,300	2,506	3,271
Northampton	531	903	1,053
Northumberland	480	622	683
Nottingham	785	1,568	2,067
Oxford	485	876	1,258
Pembroke	101	167	170
Radnor	48	79	97
Rutland	51	73	100
Salop	746	1,129	1,220
Somerset	1,505	3,000	4,087
Stafford	1,331	2,403	3,688
Suffolk	1,068	1,834	2,309
Surrey	2,189	3,779	4,790
Sussex	764	1,780	2,219
Warwick	2,084	3,755	4,337
Westmoreland	73	131	114
Wilts	809	1,831	2,616
Worcester	872	1,495	1,675
York	2,775	5,262	7,964
Total in each 7 Years.	56,308	92,848	121,518

Note.—The prisoners for trial at the Special Assizes for the several counties upon the Home Circuit, and under Special Commissions for other counties, commencing in December in each year, are included in the numbers in the following year. The prisoners for trial at the like assizes, commencing in December 1831, are therefore not included herein.

A Statement of the Number of Persons charged with Criminal Offences who were Committed for Trial, and Convicted, Sentenced, Acquitted, &c. &c., in England and Wales, in each of the Three last Seven Years.

	In the Seven Years ending with the Year 1817.	In the Seven Years ending with the Year 1824.	In the Seven Years ending with the Year 1831.
Committed for Trial.			
Viz. Males	44,150	78,364	101,638
Females	12,158	14,484	19,880
Total	56,308	92,848	121,518
Convicted & Sentenced.			
To *Death**	*4,952	*7,988	*9,316
Transportation—			
For Life	358	1,001	1,909
— 35 Years	—	—	1
— 28 Years	—	—	5
— 21 Years	—	—	4
— 14 Years	658	1,337	3,103
— 10 Years	—	4	2
— 9 Years	—	—	1
— 7 Years	5,496	10,879	14,436
— 4 Years	—	2	—
Imprisonment,— and severally to be Whipped, Fined, Pilloried, kept to Hard Labour, &c. 5 Years	4	4	1
4 Years	2	2	1
3 Years	74	84	53
2 Years, and above 1 Year	1,474	2,256	1,871
1 Year, and above 6 Mths.	4,437	7,771	8,755
6 Mths. & under	16,478	29,340	43,585
Whipping,—and Fine	1,326	1,744	2,214
Total *Convicted*	35,259	62,412	85,257
Acquitted	11,762	17,708	23,442
No Bills found, and *Not Prosecuted*	9,287	12,728	12,819
Total	56,308	92,848	121,518
* Of whom were *Executed*	*584	*626	*410

Mr. COOPER's PROPOSAL FOR A PUBLIC RECORD OFFICE, JUDGES' HALL, AND CHAMBERS.

We have repeatedly advocated the propriety of erecting a public building for the preservation of the general records of the kingdom, and for the accommodation of the Judges, in transacting the important business brought before them at Chambers. Our Contributor, the Heidelberg Student, in observing upon the Courts of Justice, was amongst the first to notice the importance of a central building for the due administration of the law;[a] and we have frequently shewn that the only fit site for such an edifice is that of the Rolls Estate. We have now to notice Mr. Cooper's plan, contained in his "Proposal for the Erection of a General Record Office, Judges' Hall and Chambers, and other Buildings, on the site of the Rolls Estate." The publication is dedicated to Lord Dover, one of the Commissioners of Public Records, at whose suggestion it appears to have been written.

It is scarcely necessary to enlarge on the obvious importance of a proper building, capable of containing the National Records. They are at present scattered in various parts of the metropolis. Those even which belong to the Courts of Justice, and particularly the Court of Chancery—which it might have been supposed would be deposited near the Inns of Court—are, as to a considerable part, in Cæsar's Chapel in the White Tower. Others are at the Rolls Chapel, the King's Mews, the Crown Office, Somerset House, and divers other places. The records are not only thus inconveniently located, but they are all of them in an insecure state, and many of them in a rapid course of obliteration. The Chapter House, Westminster, the repository of many valuable records, is in a very dilapidated condition, and in part surrounded by brewhouses and other buildings, which must be injurious to a collection of ancient records. At the Rolls Chapel there are many records in the roof, exposed to the alternate heat in the summer, and to dampness in the winter. Many of the records are much obliterated, and others liable to destruction by being placed close to the walls, the damps from which have penetrated through the backs of the presses. Those in the room over the Chapel are continually receiving injuries from the rain.

There are numerous masses of records belonging to the King's Remembrancer's Office and to the Court of Common Pleas, deposited in the Eastern wing of the King's Mews. In the cellars under the Eastern wing of Somerset House are the Pipe Rolls, the most valuable records after Doomsday, where they have been long suffered to moulder; and all attempts to induce the Ordnance to remove the magazine of gunpowder deposited in the vaults of Cæsar's Chapel, in which the most precious of the Chancery Records are preserved, have proved abortive.

A strong case is thus established for the removal of these documents from their present repositories; and it seems agreed on all hands, that the site of the Rolls estate is by far the most eligible of any that has been proposed; and the mansion being no longer used as a residence of the Master of the Rolls, no difficulty presents itself on that account.

The principal obstacle which remains in the way of effecting the object is that of the *expense* of a new building. This is sought to be removed by Mr. Cooper in the following manner; and we give his calculations fully, in order that the practicability of the measure may be clearly seen.

"It will be seen (he says) by the annexed map, that the Rolls estate, (exclusive of the premises in Fetter Lane to the north and south of the garden, and the premises in Carey Street,[b] comprises more than two acres of ground, the garden alone measuring nearly an acre. The houses in Chancery Lane are mostly occupied by attorneys and law stationers, or are let out in offices. Those in Fetter Lane are principally occupied by persons not concerned in any lucrative business, and it is believed that none of the leases are for a longer period than twenty-one years. The amount of compensation then to the tenants of premises, which it might be necessary to pull down, would present no serious impediment.

"It is proposed that the Record Office should be built in the centre of the quadrangle, bounded by Clifford's Inn Garden to the south, and the ground adjoining the Conservatory to the north, and that it should be surrounded by stone buildings, similar to those in the garden of Lincoln's Inn; part of which should be ap-

[a] Vol. I. p. 386. April 23, 1831.

[b] "These detached portions of the estate should be sold, and the price applied towards the expense of the new buildings. The premises in Carey Street are parcel of the manor of Lambeth, and upon the inclosure of the common lands of Lambeth a few years ago, an allotment was made to the Master of the Rolls in respect of this outlying property. The offset should follow the fate of the parent stock."

propriated as Courts for the Master of the Rolls and Lord Chief Baron, and the Judges in Bankruptcy out of term, a Hall and Chambers for the Judges and Serjeants, Offices for the Examiners, Clerks of the Petty Bag, Cursitors, Clerk of the Crown,[c] &c. The rest might be let, or sold, to barristers and solicitors, for chambers. The latter, supposing the Courts, Judges and Serjeants' Chambers, and Offices, to occupy two sides of the proposed square, would form the two remaining sides; and assuming that there would be twelve staircases on each of the two sides, and six sets of chambers on each stair-case, there would be one hundred and forty-four sets in the whole, a number which, it is conceived, would by no means surpass the demand for chambers so commodiously situated. Each of these sets, it may be calculated, would produce an average yearly rent of 105*l.* at the least. This yields a total yearly rental of more than 15,000*l.*; and 15,000*l.* per annum, at twenty years' purchase, will produce a sum of 300,000*l.*

"Similar chambers and offices might also, it is conceived, be advantageously erected on the frontage in Chancery Lane, which lies to the south of the above-mentioned quadrangle; and as the Judges and Serjeants would of course surrender their interest in Serjeants' Inn, upon having a hall and chambers provided for them in the new buildings,[d] valuable chambers and offices might be built upon the Serjeants' Inn estate[e]. The fund raised by the means aforesaid would, it is submitted, be amply sufficient to carry the present proposal into complete execution[f g].

"Many persons conversant with building speculations do not hesitate to affirm, that not only may capitalists be found to advance the money required for the erections, upon mortgage of the estate and buildings, but that many enterprising builders would gladly contract to erect and finish the Record Office, Courts, &c. upon a long building lease being granted them at a nominal rent of such part of the area as would not be required for those edifices. Considering the extent of the Rolls estate, the great value of all the ground in the neighbourhood, and the difficulty of procuring chambers, even of an inferior kind, at a convenient distance from those spots where the principal equity business of the country is transacted, these opinions will, it is apprehended, deserve attention, should no other mode present itself of attaining the object in contemplation. It is confidently, however, submitted, that the most beneficial course for the public would be to borrow the necessary money from the Suitors' Fund; a portion of which may be very safely advanced upon the security of the Rolls estate and the new erections."

Mr. Cooper also enters into various calculations, to shew that the income derivable from the immense number of searches which would be made if the records were properly accessible, would defray all the expense of the Record Keepers and their clerks and assistants, and thus effect a great saving to the country.

Since 1828, when Mr. Cooper's plan of the Rolls estate was taken, the *Law Institution*, as he observes, has been erected on the west side of Chancery Lane, nearly opposite the *porte cochère*, leading to the Rolls House; and the value of the ground in Chancery Lane and the neighbourhood (he subsequently notices) has been much increased by the erection of the Institution,—"the *Exchange* of the attorneys and solicitors of the metropolis;" and, he adds, "the great convenience of the contiguity of the Record Office to a place of general resort for legal gentlemen is so plain, that it is sufficient to have mentioned it."

Having thus shewn the necessity of the building, the appropriate site for its erection, and the means by which the expense may be defrayed, we shall, in an early number, advert to the plan of the several depart-

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[c] "These offices are situated in the Rolls Yard, and were built in pursuance of the act 50 G. 3, c. 164. Both the site and the ancient buildings belonged to the examiners and clerks of the Petty Bag for the time being. (*Reports from Select Committee on the Public Records*, p. 106. See also *Ibid.* p. 102.) But the above-mentioned statute has vested the freehold of the ground and present buildings in the Master of the Rolls. The Subpœna Office is also in the Rolls Yard, but the patentee and his clerk appear to have no title to the premises which they occupy."

[d] "It is understood that the Judges and Serjeants are willing to advance ten or twelve thousand pounds towards the erection of a suitable hall and chambers for their use."

[e] "This property is leasehold, held under the Bishop of Ely. There would, it is apprehended, be no difficulty in government obtaining it upon the same terms as it has been so long possessed by the Judges."

[f] "The total expense of erecting the General Register House, Edinburgh, was 37,643*l.*, and this building contains not only all the parliamentary and judicial records of Scotland, but the voluminous records of land rights, of the immense extent of which last some notion may be formed when it is stated, that the index to one particular species of instrument, comprising a period only of twenty years (from 1781 to 1800), which has lately been printed, forms 3500 pages in folio.—*Reports from Select Committee on the Public Records*, p. 399; *Cooper on the Public Records*, vol. ii. p. 306."

[g] "The rents of the Rolls estate are now applied in reduction of the salary of the Master of the Rolls. It is believed, that for the last three years they have averaged about 2000*l.* per annum. This sum should be a primary charge upon the new buildings."

ments of the building, as suggested by Mr. Cooper, and take the liberty to propose some additions and alterations, which we think will render the measure more complete and useful. We refer more particularly to the proposed Judges' Chambers, and the accommodation for the various Law Offices. The Profession are laid under considerable obligation to Mr. Cooper, for the zeal and ability with which he has brought forward the plan.

LEGAL BIOGRAPHY.

No. II.

SIR JAMES MACKINTOSH.

(*Continued from p.* 326.)

In resuming our account of the life and writings of Sir James Mackintosh, we shall in the present section confine our attention to his *parliamentary* exertions, and chiefly in relation to the Law. In the next—which will probably close the series,—we shall review his principal *literary* works; and on both occasions shall avail ourselves of such passages as bear importantly upon passing events of a legal nature.

Having noticed in the last paper his laudable services as one of the Judges of our vast Indian empire—and especially his merits when presiding in criminal matters—we have now to trace him on his return from India, which was hastened by a severe illness. He departed for Europe in the month of November, 1811. He of course arrived in England before the summer of 1812; and having in a considerable degree succeeded in reinstating his health, he yielded to the invitation which it was to be expected he would receive, and came into parliament in July 1813, for the county of Nairn. In 1818 he represented Knaresborough, and was re-chosen for that borough in the years 1821, 1826, 1830, and 1831.

It is unnecessary to dwell on the distinguished part he took in most of the questions which agitated the public mind in the course of nearly twenty years, during which he was a member of the British Senate. His name stands honourably enrolled,—if not among the most active of party-men,—certainly along with the most enlightened of our philosophic statesmen and philanthropists.

Amongst his most conspicuous efforts, we might particularly notice those which were devoted to the Abolition of Slavery and to Catholic Emancipation; but on these subjects we should not be justified in making any extracts from the numerous speeches which he delivered.

Besides these and other prominent subjects of national interest, we find in running over the Index to the Debates in Parliament, that the name of Sir James occurs with great frequency on a vast variety of subjects, indicating the extent and comprehensive nature of his exertions. Exposed, as he has been, to some remarks, for the delay of his long-announced History of England, it must be admitted that his public life was sufficiently occupied to account for the procrastination of a work which, doubtless, must have demanded, not only much research and reflection, but an extent of leisure which it cannot be said he ever adequately possessed.

He powerfully supported the cause of Parliamentary Reform during the various occasions on which it was agitated,—some specimens of which we might have been tempted to adduce; but the subject has been too recently exhausted to render acceptable to our readers any extracts from the speeches which he delivered,—always luminous and comprehensive.

We may, however, avail ourselves of some passages on the freedom and influence of the Press, in which we are naturally interested, and which, we trust, will not be deemed inappropriate, especially as they serve to illustrate the character of his Parliamentary speeches, and his views of the Law of Libel.

"It could not be denied (he said) that the political force of the press now resided in the newspapers and periodical publications. This had been effected by the changes of the times. Those who took an interest in public affairs naturally applied to these publications; this produced the effect, that all matters of political intelligence were made known through these channels. Within the last thirty years, a revolution had taken place in these publications, to a degree that could not have been possibly foreseen by any human being. It ought to be the object of the politician and legislator to make every new power which arose in any country, the ally of law and government, and not its enemy; and never to proceed to measures of restriction, till every attempt at conciliation had been made, and failed. They ought to follow the admirable policy recommended by Mr. Burke, in his speech in favor of conciliation with our colonies. 'The difference between conciliation and coercion,' said that great man, 'was this: You may try conciliation, and if that fail, you may still have

recourse to coercion; but if you try coercion, and fail, you cannot have recourse to conciliation.' The public press of this country, as it appeared to him, from the respectability and numbers of those who were connected with it, and from its having become a source of great emolument, had acquired a very great authority over public opinion. The emoluments which the press afforded necessarily attracted men of great talents towards it. During the period of his knowledge of London, which amounted then to nearly thirty years, the press had been continually improving in morality, in decency, and in respect for the laws and constitution of the country. * * * He would therefore say to the House, that they were called on to encourage a principle which would contribute more to the safe conducting of that most formidable engine, than any restrictive laws which they could possibly devise. But the press of this country had not merely been conducted in a respectable manner, it had rendered the most valuable assistance to the country. He would ask the Committee, in what way the press had lately conducted itself against the common enemies of society? He would ask, if ever a cause was maintained with more vigour of intellect, and more splendor of talent, than the cause of society had lately been maintained by the newspapers against those enemies? * * * He did not ask them to make any sacrifices to propitiate, he merely asked them not wantonly to irritate those on whose conduct more would depend, than on the laws they were now enacting. The press had a power, in the present state of society, of which it was foolish to complain. The order of things depended on causes beyond their controul. They could no more controul the order of things in society, than they could controul the planets in their courses. The order of the moral world was no more dependent on them than the order of the physical. The course of human affairs was beyond the controul of any legislator—beyond the power of any statesman. The course of affairs had given a power to the conductors of the press which could not be wrested from them. This power they might exasperate, or they might conciliate—but not annihilate. They might alienate the press, but they could not divest it of the power which the circumstances of society had thrown into their hands. By this bill they were to demand recognizances from the persons who published certain papers. Now he would ask, what was the avowed object of those who proposed this new law, with respect to recognizances? It was to obtain the security of persons possessed of property. But what were they in reality now doing? They were confounding the respectable proprietors of newspapers with the preachers of mischief and sedition; they were driving every man who had any regard for character from the property of newspapers; they were depriving themselves of that security which they derived from the emoluments of newspapers attracting men of consideration and property to them. Men of property had generally a regard to their character, and to the peace of society, in which they had so deep an interest. They could not obtain a better security than was derived from this circumstance; but they might throw it away for that which would afford them no adequate security. Would this measure not have a tendency to deter respectable men from seeking to enjoy the emoluments of newspapers—men who brought, not only the security of property, but the security of honor and liberal education? Would they not be throwing away that security, and doing what had a tendency to place the press in the hands of men of desperate poverty—fanatical, wicked, and mischievous men—who would brave all the punishments they could heap on them? They were taking the press out of the hands of men of moderation, of character—men possessed of sufficiency of fortune, and who would always remain their friends, and throwing into the hands of men of desperate fortunes, ambition, and fanaticism, that which was of more importance in this age to the well being of society, than any other power."

We are not aware that any collection of the Speeches of Sir James has been published; and in proceeding to select some further specimens of his senatorial talents and public services, we are naturally led to the subject of the *Criminal Law*, the reform of which may be considered, since the death of Sir Samuel Romilly, as peculiarly devolving on Sir James Mackintosh. The following extract presents some of his views, as concisely as we have been able to render them.

"I must be allowed to say that there is a peculiar species of legislative injustice, in the application of the punishment of death to many crimes. The punishment of death is the punishment inflicted upon the highest crime known; and it is impossible that it can be justly applied, unless it be reserved for crimes of the highest enormity. If equal punishment be inflicted on unequal crimes,—gross, scandalous, flagrant, notorious injustice must be the consequence; and it must be a fault in every system of legislation, if it do not confine the highest penalty to the highest crime. By acting upon the contrary system, we produce a disproportion between the punishment and the offence for which it is inflicted. This is the peculiar fault of British legislation, that it does not take a distinction between a crime of the first class, and that of an inferior degree, and that a similar discrimination is not made in the punishment appropriated to each. To make myself better understood, I shall just refer to the case of imprisonment for debt. The punishment of imprisonment is called by some jurists *a divisible punishment*; that is, it may be divided into different proportions, and thus applied to different kinds of crimes; but that is not, and cannot be the case with regard to the punishment of death. Death is the highest punishment which can now be inflicted for any

crime. The feelings of this latter age do not allow of the barbarous aggravations of death practised by our ancestors; and we hang alike the sheep-stealer and the parricide.

"I do not suppose that any man will justify the horrible aggravations and refinements of cruelty by which our ancestors increased the severity of the punishment of death; but as long as the present system of equal visitation for unequal guilt continues, we are the authors of the most crying injustice. If our ancestors inflicted more than mere death, by adding the cruelty of torture, at least they had the excuse that they thereby observed something like a scale of punishments. Our ancestors, even in the remotest times, endeavoured to make the punishment in some degree bear a proportion to the crime. It is true, that in times of barbarous feeling, they put men to death by cruel and detestable means; but in so doing, they provided a scale of crime and punishment. Though we have, thank God, abolished that savage and unchristian practice, we have failed to establish a *descending scale;* and since it is impossible now to inflict more than death for the greatest crimes, our only resource is to inflict less than death for offences of minor aggravation. There are various crimes placed at a great distance, both as to enormity and depravity, below the crime of murder; and yet the punishment of death is indiscriminately inflicted upon all of them."

He afterwards proceeded to observe on the degree of terror which, it is assumed, the punishment of death excites in the mind of criminals, and the feeling with which the spectators behold its infliction.

"The philosophic criminal (said he) may even imagine that at least there is something dignified in dying well, and that part of the infamy of his punishment may be compensated by the firmness of his endurance. He may feel that the infamy attached to it may be absorbed and extinguished in the blaze of a death boldly and patiently suffered, with a magnanimity and heroism worthy of a better cause. It is for that reason among others, that I think the punishment of death ill adapted to the crime of forgery; and it is to be recollected that it is not mere justice, but manifest, signal, and conspicuous justice, which is necessary to satisfy the public. Hence it may be laid down as a maxim, with very few exceptions, that the acts to which the punishment of death should be applied, should not only be in the highest degree dangerous to society, but should be attended with circumstances of violence and blood, leaving a deep impression on the mind of the community, and reviving indignation at the offender at the recollection of his crime. It is only to such fearful offences that the punishment of death should be applied. I do not mean to undervalue the guilt of forgery; but I contend that, according to the general feeling of mankind, it is not that species of crime which, by subsequent reflection upon its circumstances, excites sentiments of indignation, or recalls a sense of the justice of the punishment."

[*To be continued.*]

SIR WALTER SCOTT A LAWYER.

In some of our earlier numbers we endeavoured to prove that Shakespeare was a lawyer. We have less difficulty in claiming as a brother his twin-spirit, Sir Walter Scott. We venture to confess a true legal love for novels. We recollect that Lord Camden wrote to Miss Burney, to thank her for having written Camilla. We know how often "a marble-covered volume" peeps from under one bound in calf, or is hidden unsuccessfully by a brief. We know how often they have been the delight and solace of the living lawyer as well as the dead; and we have ourselves wandered too frequently into the fairy-land of fiction, not to be ready to defend our fellow-sinners. How happy, then, are we as lawyers, to claim Sir Walter Scott as one of us. How triumphantly does he prove, that the study of our profession has no necessary tendency to narrow or illiberalize the faculties of the mind! How proud are we to trace his legal career, which would have been deserving of notice, had it not been lost in his successes as an author!

His earliest impressions must have been professional, as his father was a respectable writer to the signet, and his mother was the daughter of a gentleman of the same branch of the law. He was educated for the Scotch bar, to which he was called in 1792, being then twenty-one years of age, and having passed through the usual course of study and examination, which are not, as in England, mere matters of form. Very soon after he received his advocate's gown, he was appointed Sheriff Depute of Selkirkshire, an office of importance, and necessarily requiring considerable legal knowledge. On the circuit, the Sheriff Depute is the public prosecutor, and somewhat resembles the Attorney-Generals of the late Welsh Circuits. Sir Walter Scott, we have understood, possessed considerable abilities as a public speaker, and was never considered deficient in a knowledge of the law. His fame as an author soon, however, transcended his character as a lawyer; and in 1806, soon after the publication of his first great poem, he was offered by Mr. Pitt the situation of one of the principal Clerks of

Session. The appointment was confirmed by Mr. Fox's administration, and he consented to accept it.

From this time Sir Walter necessarily withdrew from the more active duties of the profession, and—with all our attachment to them—we think that it was fortunate for the world. His works, however, and his novels in particular, shew that he had not forgotten his early studies; and he was evidently fond of introducing characters and incidents connected with his own profession. In Waverley, the trial and execution of Fergus M'Ivor and his clansman, are described with all the accuracy of a lawyer. In Guy Mannering, amidst the crowd of other characters, Paulus Pleydell, Esq. will be well remembered. The scene in which the orgies of the Edinburgh bar are described, at the end of the second volume, (which we believe to be literally true) has always retained a lively hold in our recollection. Where shall we find a pen that can record with such grace and life the revels of our own circuit-table? The Clerk of Sessions again discovers himself in the trial of the covenanters in Old Mortality. The proceedings before the Privy Council, and the torture of Macbriar, will not easily be fogotten by those who have read them once. The same remark applies to the admirable trial-scene of Effie Deans, in the Heart of Mid Lothian, which is unequalled, even by the illustrious author himself. The court-house—the jurors—the counsel—the judges, are all before us; and we remember it so well, that we could almost quote it as a reported case. The author just gives enough of the details to interest, without being tedious; but these details could not have been given, except by a lawyer. It is Red-gauntlet, however, that we have the most right to call our own. Here, not only is the twin-hero Alan Fairford a lawyer, but many of the principal incidents are purely legal. The cause of "poor Peter Peebles *v.* Plainstanes," Counsellor Tough, old Lord Bladderscate, rise up before us, and the whole novel may in fact be read with instruction as well as amusement to the lawyer. The last of Sir Walter's works that we shall mention for our present purpose is Peveril of the Peak. In this we have a faithful description of the state of the law, and the administration of justice, in the reign of Charles the Second. The trial before Sir Wm. Scroggs, in the fourth volume, is highly interesting in more points than one.

Thus have we, we think, made out that the profession has a fair claim to our great author; and all the readers of his novels must feel indebted to his early legal studies, which have given to many of his most famous scenes that appearance of truth and *vraisemblance* which are their highest recommendation.

Sir Walter Scott, when he died, was Sheriff of Selkirkshire; and it is creditable to the present administration, that they, in the last session, brought in, and carried through an act (2 & 3 W. 4. c. 101), by which the King was authorized to appoint a deputy during the incapacity of Sir Walter. The act, however, proved useless.

NEW BANKRUPT COURT, AND OFFICIAL ASSIGNEES.

To the Editor of the Legal Observer.

Sir,

Having had some little experience in the workings of the new bankrupt machinery, I shall not be doing justice either to the beneficial effects which have decidedly resulted from it, or to the noble and learned Lord from whom it emanated, if I were to remain a silent reader of the observations of your correspondent "I." *on the New Bankrupt Court, and Conduct of Official Assignees.* I am afraid his remarks are founded upon mere assertion: for what do they amount to, and from what source do his accusations arise? To answer these questions, it would be necessary, perhaps, to draw a full comparison between the old and new systems, and by that test to shew, first, what *was* done under the last bankruptcy tribunal—what *has* been done under the new jurisdiction,—and thus to shew whether the latter has not worked in a far greater degree better than the former. But I will not trouble you with so much detail, nor enter into an argument which could only be supplied by a narration of facts and circumstances, which, although they would confirm the view I take of the present system, would occupy too much of the columns of your periodical. I shall therefore confine my remarks to one single incident in illustration, and then ask a question or two in reply, by way of refutation. To do so, however, I must recall your attention, in the first instance, to the *substance* of your correspondent's letter; and it appears to me to consist in a complaint that the official assignee should be permitted to retain in his own hands any sum under 100*l.* arising from the bankrupt's estate. Now, I would ask the complainant to what extent he would limit the power at present vested in the official assignee; and whether he considers that officer bound (I say this on the principle of convenience,) to deposit in the receptacle appointed by the act in question to receive all such monies, every 10*l.*, 15*l.*,

20*l.*, or even 50*l.*, which may come to him in his official capacity? and what limit, I would ask also, was imposed *under the old system?* This question is readily answered. The assignees, under the late practice, retained in their hands every shilling which was realized from the bankrupt's estate. And what has been the effect of that unlimited possession, as developed by the penetration of the "persecuting zeal, unnecessarily annoying assignees under *old* commissions?" Why, nothing more nor less than a discovery of the most iniquitous frauds that can possibly canker the very core of a commercial country like our own. Thousands of pounds have been brought to light by this "detestable bugbear," the official assignee, and applied for the benefit of those creditors who might otherwise have sighed in vain for such a restoration. And what will still be the effect of this "persecuting zeal?" It will progressively expose villainy, relieve the necessitous, mitigate pain, and restore many honorable individuals to that station they before held in society. In conclusion, I have built my arguments partly on the principle of conveniency, with reference to the official assignee retaining in his hands certain monies under 100*l.*; and I have so moulded it for this reason—that, as there are expenses out of every bankrupt's estate which require immediate liquidation,—(such as the king's taxes, rates, &c.) the act has wisely and prudently left it to the discretion and option of the official assignee, either to pay in forthwith all sums received by him in that character, or such only as amount in the aggregate to 100*l.* I trust my co-contributor "I." will accept these my observations in the spirit I offer them; and in that hope I beg to subscribe myself his and your friend and reader,

ASPIRO.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

BEDFORD CHARITY.—JURISDICTION.—COSTS.

This Court has no jurisdiction under the act of 9 *G.* 4. *c.* 14, *to make new rules for the Bedford Charity. It has, however, a discretion over the costs of the petition, and the trustees have not an absolute right to such costs out of the charity funds, but to so much of them as the Master will think proper, under the direction of the Court.*

The *Lord Chancellor* gave judgment upon the petition which had been presented in the matter of the Bedford Charity, and which was frequently the subject of argument before him. It was the petition of right of the trustees of this charity, praying the Court to make certain alterations in the existing regulations for disposing of the funds of the charity, and for ordering other matters connected therewith. The case was argued at great length, the counsel for the petitioners contending that the 9 G. 4. c. 14, (an act for the regulation of this charity,) left the Lord Chancellor a discretionary power to interfere to remedy any inconveniences, when he should be satisfied that such inconveniences existed. His lordship was of opinion that he had no such jurisdiction. It was, therefore, clear that the petition must be dismissed; and having considered the question of costs, he was by no means prepared to allow the trustees to have an absolute right to the whole of their costs. They had assumed that the expenses would all fall upon the funds, and had got up this petition in the most expensive manner. It was a matter of regret that eight trustees should thus have the power to drag the charity into this Court, and make the funds pay for all. Notwithstanding the opinion of Lord *Eldon* to the contrary, he was of opinion that the Court could exercise a discretion on the question of costs, and he would write a special direction to the Master to allow none but the necessary expences incurred.

In re Bedford Charity. Sittings in Lincoln's Inn after Trinity term. L. C.

KING'S BENCH.

[Before the Four Judges.]

SETTLEMENT BY APPRENTICESHIP.

Where the father of an apprentice agreed with the master to supply the apprentice with clothes, &c.:—Held, that this covenant was not a benefit to the master requiring a stamp, according to the 53 *G.* 3, *c.* 184.

Maltby, in support of the order of sessions. The pauper was in 1823 bound apprentice by the trustees of a public charity. There was a covenant by the master to find clothes and washing, &c. Before the execution of the indenture, which had no stamp, the father of the pauper agreed with the master to find clothes and washing. The master said he would not have taken the pauper without this agreement. The trustees were not privy to the agreement. This indenture required a stamp, according to the 53 G. 3, c. 184, schedule P, title Apprenticeship:—If the sum of money, or any other matter or thing which shall be paid, given, assigned, or secured to be paid, given, assigned, or conveyed, to or for the use of the master or mistress, with or in respect of such apprentice, or both, the money or value of such other matter or thing shall not amount to 30*l.*, a stamp of twenty shillings is required. The agreement by the father to supply his son with clothes and washing comes within the act.

Lord *Tenterden*.—Are you not concluded by the case of *Rex* v. *Leighton*, 4 T. R. 732?

Maltby.—There is a more recent case: *Rex* v. *Mattishall*, 8 B. & C. 733, in which it was decided, where the parish officers agreed to give two pounds to the master to buy clothe

that this was an expense incurred by the parish within the words of the statute 56 Geo. 3, c. 39. This was not a putting out at the sole charge of a public charity. The master covenanted to find clothes and washing. He was, therefore, benefited by this agreement on the part of the father to find them.

Lord *Tenterden*.—The case of *Rex* v. *Leighton* was very much considered. We are bound by that case; the agreement in this case was a fraud, and could not have been enforced by the master against the father; he could not have maintained an action against the father.

Rule absolute.—*Rex* v. *Inhabitants of Aylesbury*, May 5th, 1832. K. B. F. J.

SETTLEMENT BY HIRING AND SERVICE.

Where a pauper has served a year at a certain sum per day, there being a custom in the colliery where hired, to give fourteen days warning:—Held, that the pauper gained a settlement by hiring and service.

The pauper was removed from *Wellington* to *Keele*. In 1813, the pauper was hired at 2*s*. 8*d*. per day, at a colliery, with a stipulation for a fortnight's warning. He was afterwards hired at Shepherd's colliery, at 3*s*. per day, in the parish of *Darley*, and resided there three years. It was proved that there was a rule in Shepherd's colliery for giving fourteen days warning.

Follett, in support of the order of sessions, contended that this was not a general hiring, but a hiring by the day.

Lord *Tenterden*, C. J.—The sessions, I think, have found that the pauper worked under this rule. This makes it a general hiring. *Rex* v. *Inhabitants of Keele*, May 5, 1832. K. B. F. J.

KING'S BENCH.—PRACTICE COURT.

ECCLESIASTICAL COURT.—DEFAMATION.

The punishment for defamation is discretionary in the Ecclesiastical Court; therefore where a defendant was sentenced to acknowledge that he believed the life and conversation of a woman, whom he had defamed, to be "sober, chaste, and honest," at the time of doing the penance, the King's Bench held, that the Ecclesiastical Court had not exceeded its jurisdiction.

Channel shewed cause against a rule for issuing a *habeas corpus* to the sheriff of Northampton, commanding him to bring up the body of Joseph Brown, who was in his custody on process issuing out of the Consistorial Court of Northampton, on the ground that the Ecclesiastical Court had exceeded its jurisdiction, in the sentence pronounced on the defendant. The sentence was, that the defendant should, in the presence of the plaintiff, Hannah Birch, confess that he had scandalously abused Hannah Birch, by saying that she was in the family way and had miscarried, that he begged her forgiveness, and further to say, "And I believe her life and conversation to be sober, chaste, and honest." The objections are, first, that the Ecclesiastical Court has no power to sentence a defendant to express his belief as to the conduct of any complainant; and, secondly, that supposing it has such a power, such belief ought only to be expressed with respect to the conduct of the complainant at the time of the defamation uttered, and not at the time of performing the penance. As to the first objection, if it were any, it could only be urged by way of appeal, the offence being clearly of ecclesiastical jurisdiction. In *Rex* v. *Payton*[a], where an application was made to discharge a defendant out of custody, and to quash a writ *de excommunicato capiendo*, on one ground, among others, that the party was only liable to the lesser excommunication, instead of the greater, Lord *Kenyon* observed, in his judgment, "that, if objectionable, is only the ground of appeal: it is merely that the Judge has not proceeded according to the proper forms of the Ecclesiastical Court." He also cited *Barne's case*[b]. As to the second objection, the construction of the words of the sentence shewed that the intention of the Court was, that the expression of belief as to the sobriety and chastity of the complainant's life, should apply to the time at which the offence was committed. But whatever construction might be put on those words, the only mode in which that objection could become available would be by appeal.

Humfrey, *contrà*, submitted, that the jurisdiction of the Ecclesiastical Court had been clearly exceeded. If it had a right to require a defendant to state that he believed the complainant "chaste and honest," it would have equal power to require him to say that he believed her to be "handsome," or "well made." Now the usual form of penance, prescribed in 2 Burn's Ecclesiastical Law, 138, 8th ed., was this: "The defamer publicly pronounces, that by such and such words (as are set forth in the sentence to have been spoken by him) he hath defamed the plaintiff, and therefore, that he begs pardon and forgiveness, first of God, and then of the party defamed, for his uttering such words[c]." That was very different from expressing any belief as to the conduct of the complainant. He cited *Rex* v. *Dugger*[d]; *Rex* v. *Thomas Jenkins*[e]; and *Rex* v. *Henry Maby*[f]. But whatever authority the Ecclesiastical Court might have to require the defendant to express his belief as to the complainant's conduct at the time of uttering the defamation, it could have no power to require him so to do, as to the time of doing penance, to which the words of this sentence clearly referred. The name of the sentence, which was "recla-

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[a] 7 T. R. 153.
[b] 2 Rolle's Rep. 157.
[c] 1 Oughton, 392-3.
[d] 5 B. & Ald. 791. 1 D. & R. 460. S. C.
[e] 3 D. & R. 41.
[f] 3 D. & R. 570.

mation," clearly only implied a recalling of the defamation uttered.

Taunton, J.—This was an application to discharge the defendant out of the custody of the sheriff of Northampton, where he was, on a writ *de contumace capiendo*, issuing out of the Consistorial Court of Northampton, on the ground that the Ecclesiastical Court had exceeded its jurisdiction. The defendant had imputed incontinence to the plaintiff, who was a female, and she had libelled him in the Ecclesiastical Court. The sentence pronounced was, that the defendant should acknowledge that he had wrongfully imputed misconduct to her, and should also repeat these words, "And I believe her life and conversation to be sober, chaste, and honest." These words, it is contended, not only referred to the time when the scandal was uttered, but also to the time at which the acknowledgment was made. The argument was, that the Ecclesiastical Court had not power to enforce such an acknowledgment in the present tense. It appears to me, that there is no reason to find fault with the sentence of the Court on that ground. If the sentence had been, that the defendant should acknowledge that she "was or had been" sober, chaste, and honest, at the time when the defamation was uttered, it might have been open to misconstruction. It might have been an additional insult, by the implication that he considered her no longer to be so. It is not, however, necessary for me to consider that. It was competent for the Court to enforce such an acknowledgment as that; because I find in the books respecting the jurisdiction of the Ecclesiastical Court, which is recognized by the stat. of *circumspecte agatis*, 13 Ed. 1. stat. 4, the punishment of defamation is to be enjoined at the discretion of the Judge[g]. It is not a fixed penance, nor has it any particular *formula* of language, the Judge below having a discretion as to the amount and form of penance; and, as I think, it is impossible to say that he has exercised his discretion improperly, the present rule must be discharged.

Rule discharged.—*Birch* v. *Brown*, May 8th, 1832. K. B. P. C.

NISI PRIUS.

INSOLVENT.—FRAUD.—ATTORNEY AND CLIENT.

Quære—*Whether an intentional omission by an attorney, who prepares an insolvent's schedule, to insert his own debt, is sufficient to bar an action for that debt after the insolvent's discharge?*

This was an action brought by the plaintiff for money lent to the defendant, previous to her insolvency: the plaintiff prepared her schedule, and omitted to insert his own debt, and, after her discharge under the act, sued her.

The Foreman of the Jury said, we are all of opinion that the plaintiff wilfully omitted to insert his own debt in the defendant's schedule.

Littledale, J.—I have some doubts whether the wilful omission on the part of the plaintiff to insert his own debt in the insolvent's schedule is a bar to the action.

Verdict for the plaintiff.—Damages 118*l.*, with leave for the defendant to move to enter a verdict, on the ground of fraud in the plaintiff's conduct.—*Howard, gent. one, &c.* v. *Smith*, Feb. 7, 1832. K. B. N. P.[h]

[g] 1 Ought. 391-2.

NOTES OF THE WEEK.

CRIMINAL CODE.

On this important subject, which must necessarily occupy much of the attention of Parliament during the next Session, we have in the present number laid before our readers part of the Returns to Parliament, which afford valuable information towards an accurate judgment. We shall continue to make such selections as may be useful, and from time to time notice the alterations which are proposed. In taking a review of the speeches and writings of Sir James Mackintosh, we avail ourselves of the materials he has contributed to the discussion.

OPERATION OF THE REFORM ACT.

It will have been observed, that we some weeks ago commenced a selection of Queries and Answers on the *Law of Elections*; and it is our intention to devote some space to articles on that subject. To our country subscribers, we understand this department will be found particularly useful; and similar brief disquisitions on points of the law of Property and Conveyancing, and of Landlord and Tenant, we are also induced to continue.

PROVINCIAL LAW SOCIETIES.

We remarked, in the early part of this work, that since the discontinuance of the ancient practice of attorneys and solicitors belonging to the Inns of Court and Chancery, and "coming into commons," (as the Rule of Court expresses it,) "for their great ease in transacting causes one with another, and much benefit to their clients[a]."

[h] Vide *Carpenter* v. *White*, 3 Moore, 231.

[a] M. T. 3 Anne.

this branch of the Profession has resorted to the expedient of forming voluntary associations among themselves, which usually bear the name of "Law Societies." We intend to take an early opportunity of noticing fully the objects and advantages of the *Incorporated* Law Society; but are induced, for the present, to advert to one of the Provincial Societies, an account of which has just been sent us[b]. It is called The *Hertfordshire* Law Society; but is intended to include attorneys and solicitors practising in the adjacent counties of Essex, Cambridge, Bedford, and Buckingham. The objects of the Society are stated to be as follow:

"To encourage a liberal and honorable course of practice; to preserve the privileges, and support the credit of, and prevent abuses in the profession; for repressing the illegal practice of uncertificated persons; for exposing any dishonorable or disreputable practice of any professional person residing or practising within those counties; and for such other purposes as may from time to time be considered most conducive to that respectability from which the real interests of the profession are inseparable."

In framing the rules, due care appears to have been taken to guard the Society from the admission of improper members, and to relieve it by the expulsion of those who may be guilty of improper conduct. Mr. Longmore, of Hertford, has been appointed President of the Society; Mr. Blagg, of St. Albans, Vice-President; Mr. Story, of St. Albans, Treasurer; and Mr. Pugh, of Watford, Secretary.

ANSWERS TO QUERIES.

LAW OF LANDLORD AND TENANT.

DISTRESS BY EXECUTORS. P. 320.

With respect to this query, it will be better to consider, first, whether the executors of a person holding any tenure can distrain for arrears of rack-rent incurred in his life-time. Secondly, what distinction the different nature of such tenure has given rise to. *As to the nature of the rent.*—Looking to the express words of the statute 32 Hen. 8. c. 37, it clearly does not directly affect rack-rents, inasmuch as they are not mentioned. No question, however, on this head appears to have been noticed in the works treating on this branch of jurisprudence; and on the authority of L. C. J *Best*, in a case under the above statute (*Staniford* v. *Sinclair*, 2 Bing. 193), "that where a statute is remedial, the Court is bound to put upon it the largest and most beneficial construction they can, and to bring within the scope of the act all the cases which are within the mischief to be provided against;" I think, in the absence of any decision to the contrary, we may reasonably conclude that rack-rents would come within its provisions.

As to the nature of the tenancy.—Whether, if a person seised in fee of land, demises it for years, reserving rent, his executors can distrain for arrears incurred in his life-time, is a point upon which the Courts have expressed opinions so opposite, that we are yet in want of any decided authority on the subject. On the one hand, it is contended, they cannot distrain; for such a landlord is not tenant in fee, fee tail, or for years, and it is the executors of such tenants only who are mentioned in the act. Of this opinion the Court seemed, in *Renvin* v. *Watkin*, M. S. Selw. N. P. title Distress; and the following were cited; 1 Inst. 162 (a); 4 Rep. 50; Cro. Car. 471; Latch. 211; and *Wade* v. *Marsh*. On the other hand, in *Powel* v. *Killick*, Bull. N. P. 57, where, in trespass for entering plaintiff's house and carrying away his goods, defendant gave in evidence, that he was executor of *A.*, who was plaintiff's landlord of the house, and that he distrained for rent due to his testator at the time of his death, upon a lease for years: it was objected for plaintiff, that the statute did not extend to such a case. *Lee*, C. J., overruled the objection, and said, this was a rent service, *the testator being in his lifetime seised in fee, and the plaintiff holding under a tenure which implied fealty*. In more modern cases also, judgment has been given for the executors, on the ground that it did not distinctly appear upon the record, that the rent distrained for was for years only. *Martin* v. *Burton*, 1 Brod. & Bing. 279; the above case of *Staniford* v. *Sinclair*; and *Meriton* v. *Gilbee*, 8 Taunt. 159, in which last case J. *Burrough* said he thought *Powel* v. *Killick* well decided. On the whole, therefore, though the cases are certainly conflicting, I incline to think it the better opinion, as well as being perhaps more satisfactorily supported by the authorities, that the executors of a landlord holding in fee, or by any other tenure, can distrain for arrears of rack-rent incurred in his life-time, under 32 Hen. 8. c. 37. This question is one of importance, and well deserves the attention of any of your correspondents. MANCUNIENSIS.

EXECUTOR'S LIABILITY.—DILAPIDATIONS. P. 335.

The executors can only be liable for such dilapidations as were not repaired in the life-time of their testator, and for those which occurred while they held the same. No ne-

[b] We shall be glad to receive the communications of the several other societies in the country.

cessity exists for the executors to set apart any portion of the purchase money for such reparations, as the purchaser from them takes the property subject to the performance of the covenants contained in the lease. E. M.

COMMON LAW.

STATUTE OF LIMITATIONS. P. 335.

A. can clearly recover the whole of the interest due to him upon his security; as the covenant for the payment of the interest, always inserted in such deeds, prevents time from operating as a barrier. E. M.

COMMON RECOVERY. P. 336.

1. The widow had not such an interest in the premises, as would prevent the recovery suffered by the tenant in tail from operating on the whole estate. E. M.

2. The widow of tenant in tail cannot be defeated of her title to dower by the recovery suffered by the eldest son of tenant in tail, unless she be made a party, and join in such recovery. *Vide* Stat. Westminster 2d; and 2 Inst. 347. W. L. H.

LAW OF PROPERTY AND CONVEYANCING.

PROGRESSIVE STAMP. P. 336.

It was held in the case of *Windler* v. *Fearon*, 7 Dow. & Ry. 185, that the indorsement upon a deed, of the parties, &c. was no part of the deed, and not necessary to be counted, with reference to the stamp duty. Mr. J. *Littledale* says there, "The indorsement is no part of the deed itself. It is not material to the construction of the deed. The indorsement alluded to in the schedule to the Stamp Act, means an indorsement which is to control the operation of the instrument." See also on this point, *Lord Dudley and Ward* v. *Robins*, 3 Car. & Payne, 26; and *Bowring* v. *Stevens*, 2 Car. & Payne, 337. J. B. T.

DESCENT TO AN HEIR DEFEATED BY A POSTHUMOUS HEIR. P. 336.

1. A title from a presumptive heir cannot immediately be safely relied on, as such heir has not an absolute seisin; for on the birth of a posthumous heir, the estate becomes devested from the presumptive, and is vested in the posthumous heir, who can recover the possession of the estate from any purchaser.

T. T. P.

2. I think an heir presumptive *cannot* immediately make a good title to land descended to him, and that any sale thereof to a purchaser could be set aside by a posthumous heir, inasmuch as the purchaser could not have a better title than his immediate vendor, whose right to the inheritance would be defeated by the contingency of some nearer heir being born, and whose estate in the land descended would be totally devested by the birth of a posthumous child. Watk. Desc. C. 4; and *vide* 10 & 11 W. 3 c. 16, by which it is enacted, that posthumous children shall be capable of taking in the same manner as if born in the father's lifetime. W. L. H.

VESTED LEGACY. P. 191.

As the accumulations were not provided for under *A.'s* will, I think that they cannot be bequeathed, or charged in any manner like the original stock, by any of *B.'s* brothers; and that on *B.'s* death, they must be divided among his next of kin *then* living, according to the Statute of Distributions; provided he shall not have at any time previously recovered. The question, as to whether a creditor of any of *B.'s* brothers can be excluded from participating in the accumulations, if the assignor should die before *B.*, involves a point of difficulty; and perhaps some of your correspondents can refer to some authorities on the subject.

DEVISE.—ANNUITY. PP. 304, 333.

With deference to your correspondent E. M., I conceive he will, on re-consideration, own himself to be in error on the above point, as laid down in the last number of your valuable periodical.

First, In accordance with the rule, "*Nemo est hæres viventis*," the son of *D.* (the daughter) cannot (as E. M. says) take a *vested interest* in any portion of the 700*l.*; his interest is only *contingent until D.'s death*, when, if he survive her, it will become *absolute*, if (as seems most probable, *D.* being a grandmother) he be her then only surviving child.

Secondly, The grandson could only take "a vested interest in *a moiety*," supposing him to have a brother or sister living at *D.'s* decease. As to "the other moiety being *vested* in the *husband of the deceased daughter*," neither the husband nor the granddaughter can by possibility take *any* interest in trust money. The words of the bequest are, "to such *issue of D. as shall be living at her decease*;" consequently, *D.'s* daughter *dying in her mother's lifetime*, the bequest cannot apply to her or her daughter now living. How, therefore, can the fact of "the husband obtaining administration to his wife's effects" give him a "*vested* (or any) interest in the other moiety," in which his deceased wife never had more than a *contingent* interest? H.

QUERIES.

LAW OF ELECTIONS.

RIGHT OF VOTING IN LODGERS.

A. takes lodgings of *B.*, the owner of a cottage near London, at a fixed weekly sum, far

exceeding in the aggregate amount 10*l.* per annum. He has occupied the whole of the upper story of the cottage for the last twelve months; his landlord occupies the remainder of the cottage, and has paid up the rates and taxes for the whole of the premises, as required by the act. 1st, Does *A.'s* occupation create such a tenancy as to make him, *for the purpose of voting*, a distinct holder or tenant? I conceive that the words "or other buildings," in the act, apply as forcibly to *apartments* held as above described, as to a "counting-house" or "shop," both particularly specified in the act, each being only *part* of a house or building. And, 2dly, supposing *A.* to be entitled to vote, is it absolutely requisite that he should *demand to be rated* in respect of such apartments? or will the payment by the owner *of all rates and taxes due* in respect of the house and premises, be sufficient to satisfy the statute? H.

TRUSTEES.

By indentures of bargain and sale, a plot of land was conveyed to trustees, upon which they have erected a chapel. The trustees, in purchasing the land and erecting the chapel, have been put to the expense of about 1400*l.*, part of which sum has been defrayed by voluntary subscriptions, and the residue, 1000*l.*, they are personally responsible for the payment of, having given bonds and notes for securing the same. The pews are let, and the trustees receive the rents, keep down the interest, and reduce the principal. The trustees have registered their claims under the Reform Act. Will they be allowed to remain upon the registry, and vote, inasmuch as they derive no beneficial interest in the premises? If not, what trustees will be permitted to exercise the elective franchise? W. C.

PRACTICE.

BILL AGAINST ATTORNEY.—INDORSEMENT.

In reference to the general rules of Hilary term, 2 W. 4, I should be glad if some one of your numerous correspondents would inform me, through the medium of your pages, whether it is necessary to indorse upon the copy of a bill served upon an attorney, the amount claimed for debt and costs. The words of the rule are, "that upon the copy of *any process* served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for costs," &c. T. P.

WARRANT OF ATTORNEY.

Where the warrant is given by two defendants jointly and severally, will the Courts allow judgments to be entered up against the survivor, in the event of the decease of his co-defendant? J. M.

LAW OF PROPERTY AND CONVEYANCING.

MORTGAGE.—REVESTMENT.

Can any of your numerous correspondents inform me if, upon a mortgage by demise, conditioned to be void on payment of principal and interest upon a certain day therein named, the payment thereof upon such day will operate to determine the trust, and revest the same in the mortgagor? W. A. S.

BEQUEST.

Testatrix directed the residue of her estate and effects to be sold and invested in government securities, in the names of her executors, and the interest and dividends to be equally divided, as they should become due, between her two sons, *A.* and *B.*, for the term of their natural lives; and after their decease, to be paid to their respective children. But in case they should leave no such issue, then the whole of such stock, interest, and dividends, to descend to her nephews therein named, their heirs, executors, and administrators. *A.* dies without issue. 1. Is *B.* entitled to the whole of the dividends and interest for life? or does a moiety descend to the nephews? 2. Upon the decease of *B.*, leaving children, will these children be entitled to the whole, or a moiety of the *principal*, as tenants in common? or of the *dividends and interest* only for their lives? W. M.

COMMON LAW.

SETTLEMENT.—EMANCIPATION.

A. B. had a settlement in the parish of *Y.*, and resided in the parish of *O.* One of his sons, 15 years of age, hired himself for a year in the said parish of *Y.*, and which service he fulfilled, but continued to sleep at his father's house the whole of the year, in the said parish of *O.* Did the son gain a settlement in the said parish of *O.*, on account of his lodging there, whilst he was serving his year in the said parish of *Y.*? W. C.

MISCELLANEA.

LORD THURLOW'S EARLY PRACTICE AT THE BAR.

It was his aim, in practice, to give his oratorical productions more the air of genius than industry, and they often carried the appearance of spontaneous effusion, although the effort of much premeditation and previous labour. Vanity is the ruling passion of humankind, and we all wish to go forward rather by the impulse of the mind, than the labour of the oar, although attainments by the means of industry are certainly as honourable, and generally more successful.

The Legal Observer.

VOL. IV. SATURDAY, OCTOBER 13, 1832. No. CIV.

> ——— "Quod magis ad NOS
> Pertinet, et nescire malum est, agitamus."
> HORAT.

THE LORD CHANCELLOR'S PLAN OF CHANCERY REFORM.

We have now before us ample materials for forming an opinion on the Chancellor's plan of Chancery Reform. The Bill before us, of which we have already given our readers an abstract,[a] is his Lordship's deliberate and matured proposal for the remedy of the present grievances in the Courts of Equity. Various portions of it have before appeared, in separate Bills, or speeches. The proposed alterations in the Master's Court, were with some modifications laid before the House and the public more than a year ago, and were made the staple of a bill, which we printed at the time.[b] Mr. Spence also prepared a semi-official bill[c]; and the subject was kept alive from time to time by speeches by the Lord Chancellor and others, in both Houses of Parliament, in which numerous proposals of reform were made, and projects of change broached. Some of these have been suffered entirely to drop; others have been much altered; and from the whole a selection has been made, which has been embodied into a substantial form in the present Bill. Purged therefore, and thoroughly sifted, as it must have been, its provisions are of the greatest importance, not only in the changes they propose to effect, but in the great probability that they will become the law of the land. We shall therefore consider them one by one.

1. The first proposed alteration is taken nearly verbatim from Mr. Spence's Bill; and by it the Report Office, and the offices of Entering Clerks, Clerk of the Exceptions, and the Agent to the Senior Deputy Registrar, are to be abolished, and the duties of their offices are (as well as their own) henceforward to be performed by six Registrars with six Clerks, who are named in the Bill, which also provides for the appointment of new Registrars on the death or resignation of those appointed. By this alteration a considerable saving,—18,000 *l.* per annum, as it has been stated by the Lord Chancellor,—will be effected, and it must therefore meet general approbation.

2. The second proposed alteration affects the present Masters in Chancery. It is proposed to enact that there shall be a Court, to be called "the Court of the Masters of the High Court of Chancery;" and that the Lord Chancellor shall nominate four of the Masters to be Judges of the Court for one year, and that the Court shall have the jurisdiction, and shall hear the matters mentioned in a preceding page.[d] This Court will have the advantage of publicity; but the present responsibility of the Masters, in acting singly, will no doubt be lessened. We perfectly agree in the propriety of transferring the matters which we have before mentioned to this Court, as they now very frequently waste the time of the

[a] *Ante*, p. 343. [b] 2 L. O. 402. [c] *Ante*, pp. 7 and 65.

[d] *Ante*, 344.

Vice Chancellor or Lord Chancellor, and can just as well be decided by the Masters: and on the whole we approve of this proposed alteration, although it is to be remembered that a *fifth* Court, attended by the same counsel, is thus made. It would be still more difficult to object with propriety to the clauses which relate to the future appointment of Masters' Clerks, and the abolition of *copy money* and *gratuities*. It is also intended that the present mode of remunerating the Masters shall be abolished, and that fixed salaries shall be substituted. Some fees are however still to be paid, and before we can decide upon their propriety we must see the schedule of them, which is not appended to this bill, but which we suppose will be printed by the House of Commons.

3. The third proposed alteration demands great attention. It proposes an important innovation in our present judicial system, being "A Court of Appeal," consisting of the three Judges of the Equity Courts and the Chief Baron of the Exchequer, which is to hear and determine appeals from the decrees of the Lord Chancellor, Master of the Rolls, Vice Chancellor, and Chief Baron; but the Judge from whose decision any appeal shall be made, is not to be one of the Judges to hear and determine such appeal. Where three of these Judges concur in the decree to be pronounced in any appeal, then the judgment of such Court shall be final; but when the three shall not concur, then an appeal may be made to the House of Lords: but the right to appeal *in the first place* to the House of Lords is not taken away. On an original hearing of a cause, there may be some doubts whether a single Judge be not the most perfect tribunal; but a Court of Appeal, it appears to us, should be composed of a plurality of Judges. We cannot therefore but look upon the proposed Court of Appeal as a boon to the suitor: and we know not where to find more fitting elements for its composition than those proposed. The disadvantages of the House of Lords as a Court of Appeal in most cases, but in particular as to decrees of the Lord Chancellor, have been so often pointed out as to be notorious; and we certainly should prefer the new Court. Nevertheless, if any one should have a predilection for the House of Lords, it will still be open to him. We shall therefore be well satisfied with this alteration.

4. The fourth proposed alteration, if it can be so called, is the giving the House of Lords power, during the hearing of any appeal from any Court of Equity, to direct the attendance of all or any of the Equity Judges. As to the propriety of this there can be no doubt.

5. The fifth intended change is perhaps a consequence of the third. It proposes to enact, that after the establishment of the new Court of Appeal there shall be no appeal from the Master of the Rolls or Vice Chancellor to the Lord Chancellor; but it is provided that nothing in the Act shall impeach or alter the Lord Chancellor's authority in bankruptcy or lunacy.

6. The sixth proposed alteration is to authorize the Examiners of the Court of Chancery to administer the usual oaths to the witnesses examined before them.

We have now stated the changes which the Bill proposes to introduce; and we have so often found ourselves called upon to differ with the measures of the present Lord Chancellor, that we have the more pleasure in declaring our approbation of this. Undoubtedly it will be said, and with perfect truth, that it goes to diminish the labour of its noble introducer. It has an unquestionable tendency, in most of its provisions, to lessen the business of the Lord Chancellor's Court; but as the arrear before this Judge has been so great for so many years, and has been with so much difficulty kept under, and as by the proposed changes the burdens of the suitor and the public are to be diminished and not increased, we consider this is rather worthy of praise than of blame.

THE PROPERTY LAWYER.

No. VI.

DEVISE.

It has long been settled, that if lands be granted to two and the survivor of them and the heirs of the survivor, they take an estate of freehold during their joint lives, with a contingent remainder in fee to the survivor. The leading case deciding this is *Vick* v. *Edwards*, 3 P. Wms. 372; and see Butl. Co. Lit. 191 a. *In re Harrison*, 3 Anst. 836. *Stones* v. *Heartley*, 1 Ves. sen. 165. In a recent case, *Doe* d. *Young* v. *Sotheron*,[a] the devise was as follows: "I give and bequeath all my real and personal estate, of what kind soever, unto my sister M. S., wife of T. S., and E. S., daughter of the said T. S. and M. S. joint-

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[a] 2 B. & Ad. 628.

ly, in trust for the uses above mentioned, and do appoint them executrixes of this my will, and do give them the residue or remainder of all my real and personal estate to them and the survivor of them their heirs and executors for ever." It was contended by *Campbell*, that this devise came within the rule of *Vick* v. *Edwards*, and gave M. S. and E. S. estates for life, with a contingent remainder in fee to the survivor. *Follett*, on the other side, however, was desired to pass over this point, the Court (of King's Bench) being of opinion that the devise gave an estate to them as joint tenants in fee.

THE REVISING BARRISTERS UNDER THE REFORM ACT.

The time now draws near when the labours of the Revising Barristers will commence. On the 15th of the present month, they are to try their "prentice hand" on their new duties. From all that we can learn, there will be no little difficulty in this first exercise of their functions. They will necessarily be new and strange; the *minutiæ* are all unsettled; the *practice* is yet to be made; precedents are much wanted. This being the state of things, it was thought expedient to call a general meeting of all the gentlemen appointed, to agree, if possible, on all that was capable of being settled. A committee was elected, a secretary appointed (we need not give the names); a day was fixed, *viz.*, the 2nd day of October; a rendezvous was selected, *viz.*, Serle's Coffee House, and most of the Revising Barristers in town attended. Whether we were there as such, or by virtue of our duplicate of Gyges' ring, is nobody's concern. The question which we before[a] mentioned, as agitating the minds of the junior Judges, we mean the *wig* question, was first discussed; and it was recommended that the usual costume of the bar should be adopted. This matter having been disposed of, the still more important question of "what should be charged," and "what would and what would not be allowed," engrossed universal attention. These matters we purposely abstain from mentioning in detail; but we may mention that it was agreed to ask Lord Althorp's opinion as to what would be allowed in certain cases. This was accordingly done; and it so happened, that it reached Lord Althorp, at Lord Grey's, where the Lord Chancellor was also staying; and an answer was returned, that the Lord Chancellor was of opinion, that they could not lay down any rule in these matters; that by the act, every barrister was to charge all his expenses, neither more nor less, and what was actually expended was actually to be charged. We know that this has been the opinion of many of the gentlemen appointed, by which they determined to act; and perhaps we may be permitted to say, that the proceedings of the Committee have not been looked upon with satisfaction by *all* the gentlemen for whom they were so good as to act. However, the Revising Barristers have, in many respects, a difficult and delicate task; and most heartily do we wish them well through their labours. In most of the contested places, we have heard, that the number of disputed votes is very considerable; and we can well imagine, that half of the voters on the overseers' lists will, in many places, be found defective.

[a] *Ante*, p. 259.

NEW BILLS IN PARLIAMENT.

ANALYSIS OF A BILL INTITULED "AN ACT TO AMEND THE LAW RELATING TO BRIBERY IN THE ELECTION OF MEMBERS OF PARLIAMENT."

1. That any Committee of the Commons House of Parliament appointed to decide on any election petition shall have authority to examine on oath any petitioner or person petitioned against; and that any such Committee, or any Court in which any prosecution or suit shall be tried for any offence against 2 Geo. 2. c. 24, or 49 Geo. 3. c. 118, shall have authority to examine on oath any agent or other person, and that no such agent or other person so examined shall object to answer any question on account of his answer having a tendency to prove or proving that he has been guilty of bribery or any other illegal practice tending to influence persons either to give or withhold their votes at the election of any member or members of parliament; provided that no person whom such a Committee or Court shall think proper to examine shall be liable to any prosecution on the evidence given before such Committee or Court, or on any other evidence, *if* such Committee, or the Judge of any Court before whom any such prosecution, action, or suit shall be tried, shall give the person examined a certificate that he has, in his or their opinion, spoken the truth, the whole truth, and nothing but the truth, according to the best of his knowledge, upon his examination; and it is further provided, that in case the Committee or such Judge should decline to give the person examined such a certificate, he shall not have a verdict against him in any prosecution, action, or suit

that may be instituted against him, *if* the jury by whom he shall be tried find that he did, on his examination before such Committee or Court, deliver the truth, the whole truth, and nothing but the truth, according to the best of his knowledge.

II. That any natural-born subject of Great Britain may petition against the return of members of parliament; and if a Committee of the House of Commons shall report that any offence has been committed by any person against either of the above acts, all or any of such persons, jointly or severally, shall be liable to pay all the expenses which the petitioners shall have duly incurred by the presenting and proving their petitions, which expenses may be recovered in an action of debt, with full costs taxed as between attorney and client; and if such Committee shall report that bribery has been proved against the person returned, or his agent, the seat of the person shall be vacated, and the candidate having the next highest number of legal votes shall be declared to be the sitting member, provided such candidate shall be duly qualified to sit in parliament.

III. That all gifts of money, or of securities for money for which the giver of such securities for money shall not have received full consideration from the persons to whom they are given, and all loans, from any member of the House of Commons, or of any person on his behalf, to any elector who shall have voted for such member, or to any person who shall have influenced any elector to vote for such member, (such member at the time of such gift or loan knowing that the person he so gives or lends had voted for him, or had influenced any elector to vote for him,) during the time that such member continues to represent in parliament the county, city, or borough for which the person accepting such gift or loan shall have voted or shall have influenced any other elector to vote, or within six months after such member shall cease to sit in parliament, shall be deemed an offence against the 2 Geo. 2. c. 24, without proof of any agreement for any such gift or loan having been made before the election at which such elector gave his vote; provided that nothing in this act shall apply to any reasonable compensation made to any agent for his trouble in canvassing the voters.

IV. That every person returned to parliament shall, at the time of his taking his seat, take the following oath at the table of the House of Commons:

"I *A. B.* do swear, That I have not offered, given, or promised, or lent, nor have I been privy to any offer, gift, promise, or loan of any money or other valuable thing to any voter, or to any other person having the means of influencing any voter, or to any other person, for the use of or to be paid by him or her to any voter, to give or to withhold his vote at the election of members or a member for ; and that I have no reason to know or believe that any other person has given, lent, or promised, or will give, lend, or promise, any money or any other valuable thing to any voter to induce him to vote for me, or not to vote for any other candidate, at the said election; and that I will not repay to any one, or in any other manner make him compensation, for any money or other valuable thing that such person has given or promised, or shall give or promise, to any voter, or to any person for the use of or to be paid by him to any voter, to vote or to abstain from voting at the said election; and that I will not at any future time give, or permit any person to give for me, any money or other valuable thing to any voter, or to any other person for the use of any voter, for giving or withholding his vote at the late election for the [county, city, *or* borough, *as the case may be*] of ."

LEGAL BIOGRAPHY.

No. II.

SIR JAMES MACKINTOSH.

(*Continued from p.* 361.)

One of Sir James Mackintosh's recent speeches was on the Law relating to *Anatomical Dissections*. We consider it as peculiarly characteristic of his mind; and it is also worthy of notice at a period when much difference of opinion exists on the subject it discusses. The earnestness with which Sir James enters on the question, indicates his love of science, and his zeal for the welfare of mankind. His remarks are important also as they bear on the nature of *capital punishments* for the highest offences.

"Allow me (he said) to illustrate by an imaginary case, the opposite effects of continuing to bar up, and of trying to widen, the only access to anatomical knowledge. If we were told that in some desert region of central Africa, it was the practice of a tribe of savages to put to death annually a certain number of their own sick and wounded, we should surely listen to the story with a hope to find it false. But if it were added, that these murders were perpetrated, not by the instantaneous and merciful operation of the sword, the pistol, or the axe, but by a lingering torture for months or years, we should require the strongest evidence to induce us even to listen to such a charge against cannibals themselves. If we are told that we are ourselves chargeable with equal barbarity, should we not cry out with the Syrian of old, "Is thy servant a dog, that he should do this thing?" But let us look at home. Let us not suffer ourselves to be paid in words, which, as was sharply and sagely said, "are the counters of wise men, and the money of fools." What is the substantial difference between the supposed barbarity in Africa, and the legal impediments to anatomy in Great Britain? In proportion to every degree in which anatomy declines, and medicines sinks, an additional number of

human lives must be cut short. If the healing arts preserve life, their decay must destroy it. That their improvement has contributed to that prolongation of its average duration, which has taken place during the last half century, is what nobody but the most extravagant dealers in common-place paradox will venture to dispute. The main length of life chiefly depends on the treatment of children; and the decline of medical science must be attended, in its very beginning, by a real, though not nominal, massacre of infants. If, indeed, it were to kill at a blow, it might be a blessing to many. But its victims will "die so slowly none can call it murder." The bungling surgeon will make his instrument a means of more cruelty than the tomahawk; the ignorant physician will kill only by the protracted torture of disease. Let every man who calls out law or prejudice against dissection, consider whether he does not do his utmost to abate the means of lengthening life and (what is far more important) of alleviating misery. Let him deeply reflect, whether an inconsiderate word may not make an orphan, and an inflammatory sentence may not cause unspeakable agony to hundreds. What a fearful responsibility does he incur to all those who may suffer from the blow he has struck against the healing arts!

"I should be most painfully perplexed if I thought myself, in this case, reduced to the sad necessity of choosing between the means of relief to bodily suffering, and the discipline which cultivates our moral feelings. I am not among those who underrate the rites of sepulture; still less the regard for the remains of the dead, which has prompted mankind in every age to hold those rites sacred. I believe that such a regard is inseparable from affection towards the living. As the cannibal feeds his ferocity by vindictively devouring the flesh of his enemies, so, it seems to me, funeral honours may be said, in some measure, to return and replenish those sacred fountains of kindness and compassion from which they flow. But I will not believe that the moral culture of man is at variance with his bodily welfare. I am convinced that inquiry will discover means, sanctioned by the experience of other countries, by which, while the noble science of anatomy, and the beneficent arts of medicine and surgery, are preserved among us, the alarms of affection may be appeased, and the sanctuary of the grave rendered more inviolable. I believe that a plan may be found, which will spare the feelings of every known or discoverable person; and I conceive that to require more, would be fantastic extravagance. I believe, with equal confidence, that if things go on as they now threaten, we shall close the better part of the means of instruction in the medical sciences; but that a miserable remnant must still be scantily supplied by that system of clandestine and contraband disinterment, which shocks the heart of the mourner, —degrades science, as well as renders its profession odious;—and becomes, like smuggling and poaching, a school in which men are fitted for the worst crimes.

"As to the dissection of *suicides*, it would surely be an act of wanton cruelty to survivors, in all cases of insanity, and indeed in most others. London is the capital city in Europe where they are most rare. The number is considerably greater in Paris, where the population is about one-half. The dissection of *murderers* is evidently a resource of no importance. The average number of executions for murder in England and Wales has, during the last seven years, been only fourteen, or one in 850,000 persons. In London the average of the same executions in the same time has only been five, being something more than one in 300,000 persons. When dissection was made part of the punishment for murder, it was a much more considerable resource to anatomy, which then demanded much less. According to a calculation which I have made with some care, it appears that nearly a century ago, in the year 1733, the whole executions in London were to the population as one to 10,000. In the last seven years, the whole executions for murder in the capital has diminished in a much greater proportion than that for all offences. I believe that the dissections for murder are injurious to the anatomist, by bringing new unpopularity upon his most beneficial occupation. It is at least certain that they are useless.

"Positively to add to the terrors of the punishment of death is impracticable, in a civilized age. There is only one way in which penal law can contribute to keep up the national abhorrence of murder. It is by confining the punishment of death to that crime, and to those acts of cruelty, violence, or destruction, which partake of its nature, and often lead to its perpetration. The laws which alike punish with death the murderer of his father, the stealer of a sheep, and the forger of a bank-note, do their worst to drag down parricide to the level of sheep-stealing. It is no objection to this truth, that the humanity of Englishmen, formed and fostered by far other institutions, has hitherto maintained a successful struggle against these barbarizing laws. We cannot add to capital punishment, but we may mightily strengthen its power by bringing its whole force to bear on the most atrocious crimes. I formerly laboured to perform that service, and I should be willing to resume my labours if I could hope that they would not again be defeated by the power of Government."

In closing this part of our biographical notice, it may be interesting to sum up the character of Sir James as a Parliamentary Speaker, in which we avail ourselves in a considerable degree of the remarks of an acute Critic[a].

On many occasions, it has been observed of his public speaking, that the logician took place of the orator, and that he failed

[a] Hazlitt's Spirit of the Age, or Contemporary Portraits.

to give effect to a particular point, or to urge an immediate advantage home upon his adversary, from the very enlarged scope of his mind, and the wide career he took in the field of argument. He was often rather the lecturer than the advocate. He was able to instruct and delight an impartial and disinterested audience by the extent of his information, by his acquaintance with general principles, by the clearness and aptitude of his illustrations, by vigour and copiousness of style; but where he had a prejudiced or unfair antagonist to contend with, he was just as likely to put weapons into his enemy's hands as to wrest them from him, and his object seemed to be rather to deserve than to obtain success. He could bring down the account of knowledge on a vast variety of subjects to the present moment; he could embellish any cause he undertook by the most approved and graceful ornaments; he could support it by a host of facts and examples. He was distinguished more as a man of wonderful and variable talent; but it has been said his mode of treating a question was critical, and not parliamentary. It was formed in the closet and the schools, and was hardly fitted for scenes of active life, or the collisions of party-spirit. On any question of general policy or legislative improvement, he was heard with advantage, and his speeches were attended with effect: and he would have had equal weight and influence at other times, if it were the object of the House to hear reason, as it was his aim to speak it. He did not slur his own character and pretensions, but he compromised the argument. He spoke the truth, the whole truth, and nothing but the truth; but it may be questioned whether the Senate is at all times the place where the truth, the whole truth, and nothing but the truth, can be spoken with safety or with advantage. The judgment of the House is not a balance to weigh scruples and reasons to the turn of a fraction! another element, besides the love of truth, enters into the composition of their decisions, the reaction of which must be calculated upon and guarded against. If our philosophical statesman had to open the case before a class of tyros, or a circle of grey-beards, who wished to form or to strengthen their judgments upon fair and rational grounds, nothing could be more satisfactory, more luminous, more able, or more decisive, than the view taken of it by Sir James Mackintosh. But the House of Commons, as a collective body, have not the docility of youth, or the calm wisdom of age; and often only want an excuse, to adhere to what they have already determined upon; and Sir James, in detailing the inexhaustible stores of his memory and reading, in unfolding the wide range of his theory and practice, in laying down the rules and the exceptions, in insisting upon the advantages and the objections with equal explicitness, would be sure to let something drop that a dexterous and watchful adversary would easily pick up and turn against him. He raised so many objections for the sake of answering them, proposed so many doubts for the sake of solving them, and made concessions where none were demanded, that his reasoning had the effect of neutralizing itself; it became a mere exercise of the understanding; and the provident engineer who was to shatter in pieces the strong-hold of corruption and oppression, by a well directed and unsparing discharge of artillery, seemed to have brought not only his own cannon-balls, but his own wool-packs along with him, to ward off the threatened mischief. Sir James, however, on some occasions, with the help of practice, lowered himself to the tone of the House; and applied himself to questions more congenial to his habits of mind, and where the success was more likely to be proportioned to his zeal and his exertions.

This may be "poor praise" to a party man, but is the highest commendation to the more exalted character of a philosophic statesman, who disdains to hasten his progress by the sacrifice of principle.

MEMOIR OF WILLIAM COOKE, ESQ. KING'S COUNSEL.

Amidst the incessant occupations of a professional life, we are apt to lose from our immediate remembrance many individuals for whom nevertheless we really entertain undiminished respect. It may be the subject either of melancholy thought, or of philosophic reflection, that there are few who can continue to maintain an equal interest in the memories of their once intimate brethren, after they have ceased to associate with them. The engrossing occupations of the lawyer preclude the possibility of paying those marks of sympathy and respect to former friends, which are enjoyed in some other walks of life. Hence the announcement of the decease of Mr. Cooke,—once well known, by reputation at least, to every practitioner in the kingdom,—created but little sensation, and, in the minds of many, recalled a name almost forgotten by the

busy men of recent years. It is our duty, however, to take honourable note of those who have been in any degree useful members of the profession, or have elucidated any department of our laws. The following particulars, which have been collected with some care, will be found we believe to be in every respect accurate.

Mr. Cooke was born in London—where his father, a respectable jeweller, resided—in the year 1757, and he received his education in the neighbourhood of the metropolis. We have not been able to learn whether he was sent to any university, nor the precise time of his becoming a student at law. It appears, however, that he was a member of Lincoln's Inn, and was called to the bar in the year 1790. He was, of course, at that time, about the age of thirty-three.

At an early period of his career, he devoted himself to the study of the Bankrupt Laws, and at length acquired, in that department, a most extensive practice. It was creditable to the Lord Chancellor Eldon, to select him as one of the Commissioners of Bankrupt—an office which he honorably filled for many years.

He principally distinguished himself as the author of a valuable work on the Bankrupt Laws, the first edition of which was published in the year 1785.[a] It passed through several editions, and was long esteemed the best book on the subject. The seventh edition was edited by Mr. Roots.

On the administration of the Bankrupt Laws, which of late has excited so much attention, Mr. Cooke was, several years ago, repeatedly examined before a Committee of the House of Commons; and it may be not uninteresting to state the opinion of a man like him, peculiarly competent to form an accurate judgment, and not likely to be unfairly influenced.

He said he thought—

"That the jurisdiction in Bankruptcy might be conveniently taken away from the Court of Chancery and a new Court substituted, if a Judge were appointed of eminence equal to those presiding in Chancery; and he thought such Court would be a very important advantage to the commercial world, and also to the Court of Chancery, as it would leave the time of the Judges of that Court open to the proper business of the Court, and would not be taken off with the Bankruptcy, which was a sort of extraneous business."

It may be observed, however, that although he thus concurred in the necessity of an alteration of the system, he by no means went so far as we have since seen adopted. He was for a *single* Judge, and of *first rate eminence*.

In 1816, he was appointed King's Counsel; but soon afterwards became so afflicted with severe and frequent attacks of the gout, that he was compelled to absent himself on many occasions from Court, and at length gave up his attendance there, and confined himself to chamber practice,—answering cases, chiefly in bankruptcy, and taking arbitrations, of which kind of business he had a most extensive share.

He possessed considerable powers of application, and it is said, that even when confined to his bed with the gout, he allowed no opportunity to escape, when free from pain, of applying himself to perusing the cases submitted to him, the opinions on which he dictated to Mrs. Cooke; and whenever a sufficient interval permitted, he proceeded with matters of arbitration.

In 1818, he went to Milan, as a Commissioner, to take the depositions of witnesses against the late Queen. When subsequently attacked in Parliament, for thus assisting in that investigation, he intimated that the matter had proceeded farther than he contemplated, and that he had not been fairly treated. He returned to England from this memorable mission in 1820, and resumed his attention to chamber business—answering cases and taking arbitrations, till he finally quitted the profession in 1825: having thus practised as a barrister for thirty-five years. Since that time, he principally resided at his house at Lenham, in Kent, where he died in the month of September last, at the age of seventy-five. His widow, who was one of the daughters of the late Mr. Legh, an eminent solicitor, survived him. He left no issue, and it is understood that the bulk of his property, which is supposed to be very considerable, will pass to his nephew, Mr. Pemberton, the King's Counsel.

Mr. Cooke was a Bencher of Lincoln's Inn, and throughout his life was much esteemed by his professional brethren, as well as all who were acquainted with him. He was of mild and gentlemanly manners, and we well recollect his pale and placid countenance. He was distinguished rather for the clearness of his statements than the force of his reasoning. His reputation rested chiefly on his well-known book, which, however, he lived long enough to see reduce almost to a dead letter by new statute both on the rules of law and the mode of i administration.

[a] This was several years before he was called to the Bar, and the humble price of 8*s.* was charged for a copy.

PARLIAMENTARY RETURNS

Of CRIMINALS *in* ENGLAND *and* WALES, 1832.

A Statement of the Number of Persons convicted of Crimes for which they received Sentence of Death, and the Number thereof who were Executed, in England and Wales, in each of the Three last Seven Years.

CRIMES.	In the Seven Years ending with the Year 1817.		In the Seven Years ending with the Year 1824.		In the Seven Years ending with the Year 1831.	
	Number of Persons Sentenced to Death.	Number of Persons *Executed.*	Number of Persons Sentenced to Death.	Number of Persons *Executed.*	Number of Persons Sentenced to Death.	Number of Persons *Executed.*
Arson and other wilful Burning	43	23	48	12	64	27
Burglary	1,133	112	2,145	133	1,437	45
Breaking into a Dwelling House, and Larceny	446	10	988	11	2,443	28
Cattle Stealing	86	—	147	3	174	—
——— Feloniously Killing and Maiming	5	1	5	1	3	—
Coining	66	1	13	5	35	7
Coin, Uttering Counterfeit (*having been convicted as Common Utterers*)	20	—	10	—	29	—
Forgery, and Uttering forged Instruments	264	101	399	85	218	17
Horse Stealing	452	13	854	14	971	37
Larceny, Grand	1	—	4	—	1	—
——— in a Dwelling House, &c.	651	6	1,057	29	994	16
——— in a Shop, &c.	216	—	114	—	—	—
——— on a Navigable River, &c.	32	5	5	2	—	—
——— from Bleaching Grounds, &c.	2	—	—	—	—	—
——— of Naval Stores, &c.	18	—	9	—	—	—
Letters containing Bank Notes, &c. Secreting and Stealing	20	2	5	4	12	2
——— Sending Threatening, &c.	—	—	6	—	—	—
Murder	151	132	122	104	100	87
——— Shooting at, Stabbing, Wounding, and administering Poison, with intent to Murder, &c.	88	27	108	30	223	27
Piracy	4	4	—	—	6	2
Rape, &c.	44	29	51	29	51	20
Riot and Felony	7	5	2	1	155	2
Robbery of the Person, *on the Highway and other Places*	546	76	919	102	1,206	67
Sacrilege	15	—	40	2	44	—
Sheep Stealing, and Killing with intent to Steal	517	16	846	40	1,039	17
Sodomy	24	13	16	14	14	9
Treason, High	32	6	34	5	—	—
Transports being at large, &c.	60	—	31	—	61	—
FELONY, *Transferring a Stamp to Defraud, &c.*	—	—	—	—	1	—
——— *Cutting down Trees growing, &c.*	1	1	3	—	—	—
——— *Stealing Woollen Cloth from a Tenter*	2	—	—	—	—	—
——— *Stealing Part of Wreck*	1	—	1	—	—	—
——— *Cutting Hopbinds growing, &c.*	—	—	1	—	—	—
——— *Rescuing Felons*	—	—	4	—	—	—
——— *Assembling Armed to assist Smugglers*	—	—	1	—	32	—
——— *Framebreaking and destroying Machinery*	4	—	—	—	—	—
——— *A Bankrupt concealing his Effects*	1	1	—	—	—	—
——— *Trafficking in Slaves*	—	—	—	—	3	—
Total Number of Persons in each *Seven Years*	4,952	584	7,988	626	9,316	410

ON THE WAPENTAKE, OR HUNDRED COURT OF SALFORD.

To the Editor of the Legal Observer.

Sir,

PERHAPS there are but few of your readers domiciled on the south side of the river Trent, who have any other knowledge of an Hundred or Wapentake Court, than is to be derived from the Commentaries; and Blackstone says little more than barely mentioning that such a court does (or rather did) exist, and that it has fallen as much into disuse as Courts Baron, with regard to the trial of actions. You, Mr. Editor, may therefore think that a communication on such a subject would be unfit for the pages of the Legal Observer; but on the other hand, if I mistake not the design of your publication, it is to disseminate useful and practical information on the subject of our laws; and that you are at all times willing that your periodical should be the medium through which any improvement, whether local or general, might be suggested. And I still further think, that neither you, nor your readers, will deem to have been misappropriated that portion of your paper which, with your permission, I would occupy on the subject of the abovementioned court, when I state that the Common Law Commissioners have not overlooked it, but have requested its officers to suggest, if they can, the means by which its utility might be increased.

Most of the inhabitants subject to the jurisdiction of this court would, I can safely vouch, have been glad to have learned, that instead of the official personages connected with the court being requested to state what improvement it were susceptible of, they had been called upon "to shew cause" why it should any longer exist. Sure I am, that to effect a radical improvement, every thing connected with it ought to be abolished. I was about to add, even the very walls themselves ought to be rased to the ground; but it occurred to me, that such a step cannot be taken, as the august tribunal does not boast of its *own* court, the business on court days being carried on in a public house.

In order to decide upon the propriety of attempting an improvement of the present court, or of totally abolishing it, I cannot do better than briefly state its jurisdiction, and the mode in which the business is conducted.

In the first place, then, it cannot be said of this court, "that it is for the ease of the people, that they may have justice done to them at their own doors, *without any charge* or *loss of time*." (2 Inst. 71.) Its jurisdiction, in point of locality, extends over the whole hundred of Salford (which comprises many miles), from any part of which witnesses may be brought on a trial, by *subpœna*, as in the other courts; so that justice is not exactly "done to the people at their own doors." Like the County Court of Lancashire, the Salford Court has a practising barrister for the Judge, a jury of twelve, a steward (who taxes costs, &c.), with the other usual subordinate officers. The action is commenced by a process called a *plaint*, or *wapentake*, which must be served personally (by a bailiff) on the defendant. The court is held every three weeks (unless the barrister be otherwise engaged, which is often the case), and the process (for which the attorney charges half a guinea) is returnable at the following court day, and if not served by that time, must be renewed. On the return of the process, the plaintiff is entitled to declare (though he may delay eleven, and sometimes twelve days, and after that obtain a rule for further time). To this declaration (which is framed much in the form used in the superior courts) the defendant has eight days to plead, unless he plead in abatement, when only four days are allowed; and in default of plea, or time obtained by rule, the plaintiff may sign judgment, tax costs, and issue execution.

In short, in point of practice, this Wapentake Court imitates the superior courts, particularly with regard to its pleading; for precedents of which, the practitioner here may use Chitty's work, as well as in Westminster Hall.

It too often happens, in the superior courts, that the costs exceed the importance of the matter litigated; but in the Salford Court that is invariably the case; its jurisdiction, in point of amount, being limited to 1*l.* 19*s.* 11*d.*, whilst the average amount of costs in an action would be about 6*l.* And notwithstanding the very small damages which the court is competent to award, it is no uncommon occurrence for cases of assault, and even slander, to be tried there; and in the latter action, the declaration, with marvellous inconsistency, adopts the verbiage of Westminster Hall; alleging that the suitor has been "harrassed, oppressed, impoverished, and wholly ruined, and sustained damage to the amount of 1*l.* 19*s.* 11*d.*"

With these facts before them, I should conclude the Commissioners will not much longer entertain the idea of improving this Wapentake Court, the legitimate business of which might so conveniently be transacted in a Court of Requests (and there is one here, having jurisdiction to the amount of 5*l.*), in which the whole proceedings, including judgment, would not cost 5*s.*, nor occupy as many minutes. Common propriety requires, that to enforce a claim of 2*l.* the claimant should not risk the loss of 6*l.*; and yet such will be the case, so long as written pleadings, and a trial by jury, are required to decide the question. To *compel* a creditor of 5*l.* and under, to go to a Court of Requests, instead of a Wapentake Court, would be a mercy, both to himself and his debtor. At present, one of the parties must, in all probability, be ruined, by an action in the latter court, from the mere amount of costs; for it is generally the fact, that the suitors are so poor that they cannot pay 6*l.* or or 8*l.* for costs, besides the debt or damages; and the consequence too frequently is, that the unfortunate party must lose his "little all in a law-suit;"—his goods are brought to the hammer, and his family turned out of doors.

Equally as ruinous as the Salford Court to the litigating parties, is the plaint process in the Lancashire County Court, by which the debt or damages recovered cannot exceed 1*l.* 19*s.* 11*d.*; whereas the costs of a defended action (witnesses frequently attending upwards of twenty miles) average 10*l.* on each side; and in one instance, I knew the plaintiff's costs to amount to 15*l.*

I would merely observe, further, that the Salford Court is quite superfluous, seeing that its functions are analogous to the County Court process by plaint; and (if such a proceeding must be continued) the latter process would be the least evil of the two. That court would be fully competent to undertake the whole business; and it would be done more expeditiously, as the County Court has the advantage of being regularly held; but the Salford Court is totally subservient to the other multifarious duties of its respected Judge, who is besides a practising barrister and a magistrate. But I would hope the Commissioners will see how judicious it would be entirely to abolish proceedings by plaint, and by that means prevent many a poor family inflicting ruin, as well upon their neighbours as themselves.

T. P.—M.

LAWS OF FRANCE.

WILLS.

In continuing the series of abridged extracts from Mr. Okey's Digest, we confine ourselves to points of popular or general interest; and select, on this occasion, the subject of wills, their various kinds, and the mode of executing, attesting, and authenticating them. It may first, however, be necessary to notice the law as to wills executed abroad, and operating in England.

A will made in France or any other foreign country, of lands in England, is within the statute that directs that all devises of *lands* or tenements shall be in writing, signed by the party devising, or by some other in his presence, and by his express direction, and shall be attested and subscribed, in the presence of the devisor, by three or four credible witnesses; the principle of *locus regit actum* does not appear to be admitted, as in the law of France. A will made in a foreign country, disposing of *goods* in England, must be proved in England: but if the effects are all abroad, and the will is proved according to the custom of the country where the testator died, it is sufficient, and the executor may plead such matter to a bill filed against him by the administrator, for an account of the deceased's personal property.

If a will is in a foreign language, the probate is granted of a translation by a notary public. A devise of real estate to the heir of an alien is void, because an alien can have no heir, either to inherit or take by purchase. British artificers, exercising their trades in foreign parts, and not returning within six months after warning given to them, are deemed aliens, and their wills have no operation in England.

The will of a party who has been long absent from England may be proved, if he is generally understood to be dead, and the executor will take upon himself to swear that he believes him to be so. If the testator resided abroad, and left effects there and in England, the will is proved, in the first instance, abroad; and a copy duly authenticated being transmitted to England, it is proved in the Prerogative Court, and deposited as if it were the original will. When the heir at law is abroad, the Court does not, as in other cases, declare the will to be well proved, but merely directs the trusts to be carried into execution.

In a suit for establishing a will, proof of the attestation of one witness only is insufficient, without positive evidence that the other witnesses are dead or resident abroad.

The following is the law of France relating to wills.

A will may be either an *olograph*, or made by *public act*, or in the *mystic or secret form*.

1. *An olographic will* is not valid, unless written throughout, dated and signed by the testator; it is not subjected to any other formality; a single word written by another person would render the will invalid, unless it be an interlineation: additions or erasures, however, will not invalidate, the words erased only being void.

2. *A will by public act* is that which is received by two notaries in the presence of two witnesses, or by one notary in the presence of four witnesses. If received by two notaries, it must be dictated to them by the testator, and be written by one of the notaries (not by his clerk), as it is dictated. If there be only one notary, it must equally be dictated by the testator, and written by such notary; and, in both cases, must be read over to the testator in presence of the witnesses, of the whole of which mention must be expressly made. If the will is dictated in a particular or provincial idiom, the notary will write it in correct language. The omitting to notice that the will was written by one of the notaries would, although the writing is that of the notary, invalidate it.

The will must be signed by the testator, or, if he knows not how, or is incapacitated from signing his name, express mention must be made of his declaration to that effect in the *acte*, as well as of the cause which prevents his signing it. The will must further be signed by the witnesses; however, in the country, it will be sufficient that one of two witnesses signs, provided the will is received by two notaries; and that two of the four witnesses sign, if it is received by one notary only.

3. *Secret Will.* When a testator is desirous of making a mystic or secret will, he must sign the dispositions, whether he has written them himself, or caused them to be written by another. The paper containing the dispositions, or that serving as the *envelope* of them, if there be one, must be closed and sealed. The testa-

tor must present it, thus closed and sealed, to the notary, and to six witnesses at the least, or cause it to be closed and sealed in their presence; and must declare that the contents of such paper are his will, written and signed by himself, or written by another and signed by him. The notary thereon draws up the superscription, which must be written on the paper, or on the sheet which serves as *envelope*; and this must be signed, as well by the testator as by the notary, together with the witnesses. The whole must be done at once, without allowing any other concern to interfere, *une tracte temporis*; and in case the testator, by an impediment happening subsequently to the signature of the will, is rendered unable to sign the superscription, mention must be made of his declaration on that subject, in which case it will not be necessary to increase the number of witnesses.

Where a testator is from any reason incapacitated from signing his name, when he causes the dispositions to be written, a witness should be called to the *acte* of superscription, in addition to the number mentioned in the preceding article; which witness must sign the *acte* with the other witnesses; and mention must be therein made of the cause for which such last witness is called. As there is no better evidence of the validity of a will, the greater the number of witnesses, the less reason will there be to suspect fraud.

Persons who are unable from ignorance or other causes to read, are not allowed to dispose of their property by a mystic or secret will. In case a testator cannot speak, but is able to write, he may make a mystic will, provided it is throughout written, dated, and signed by his own hand; that he presents it to the notary and to the witnesses; and that at the top of the *acte* of superscription he writes in their presence that the paper which he presents is his will: after which the notary will write the *acte* of superscription, in which mention must be made of the testator's having written these words in presence of the notary and of the witnesses, and of every thing having been observed, as above required.

Limitation of a Testator's Power, in favor of Children. By the law of France, the testator, when he leaves at his decease one legitimate child, may not dispose of more than *half* of his property; if he have two children, of the *third* part; and if there are more children, then a *fourth* part only of his property will be at his disposal. Under the description of children are included the descendants, in whatever degree, claiming in right of the child from whom they descend.

Wills of Frenchmen made abroad. A Frenchman, when in a foreign country, may make his will under private signature, as prescribed by the above article relating to *olographic* wills; or it may be according to the formalities of the place where it is made. The wills of Frenchmen thus made out of France are not allowed to operate upon property in France, until after they have been registered at the office of the testator's domicile, should he have retained one; otherwise, at the office of his last known domicile: and in case the will should contain a devise of real property there situate, it must be also registered at the office where such property is, but without any additional duty being chargeable.

Who may be Witnesses to Wills. In the case of wills made by public *acte*, the witnesses required to be present must be *men* of age,[a] king's subjects in the enjoyment of civil rights: but neither the legatees, by whatever title they become such, nor their relations nor connections, even to the fourth degree inclusively, nor the clerks of the notaries by whom the *acte* is taken, are good witnesses.

A foreigner in France may be a good witness to a civil *acte*, although not to a will; the reason for the distinction being, that a witness to a will should be acquainted with the laws of the country—of which a foreigner is presumed ignorant; whilst in civil *actes* it is the mere verification of a material fact.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

APPEAL.—SPECIAL CASE.

An appeal from an order of the Bankruptcy Court of Review to the Lord Chancellor is not to be brought on by petition, but in form of a special case, as directed by the act 1 & 2 *W.* 4, *c.* 56, § 3.

A petition was presented to the Lord Chancellor, praying that an appeal from an order of the Court of Review in Bankruptcy be heard forthwith. The circumstances were these:— An original petition was presented, praying that a commission, which was issued against a bankrupt, be superseded, upon the ground that he was not a trader within the act 6 Geo. 4, c. 16. The Court of Review, after hearing the arguments on that petition, ordered the *supersedeas* to issue. An application by motion was afterwards made to this Court, to stay that *supersedeas* until an appeal from the order of the Court of Review could be heard. It being found that such a mode of proceeding was irregular, the present petition was presented; and it stated, that there was not sufficient time to prepare a case, as directed by the new act; and prayed that the *supersedeas* might be stayed, or the appeal from the order of the Court of Review heard upon that petition. The opposition to this petition was upon the ground that, as the act constituting the Court of Review had directed appeals to be heard only upon a special case, it was not

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[a] Witnesses to all documents must be men of at least twenty-one years of age.

competent for the Court to hear it in any other form.

The *Lord Chancellor* said, that he considered this petition altogether irregular. He could not discover in the circumstances any reason to justify a departure from the directions of the act of parliament 1 & 2 W. 4. c. 56. He therefore ordered the petition to be dismissed, but without costs, as it was the first of the kind that was yet presented. At the same time, he desired it to be understood, that if any similar application should be hereafter made, the parties making it would have to pay the costs. *Ex parte Winton, in re Parker.* Sittings in Lincoln's Inn, after Trinity Term. L. C.

PRACTICE.

An application to expunge interrogatories and answers to them, on the ground that they are leading questions, is not to be decided by this Court, but referred to the Master.

The *Lord Chancellor*, having stated some circumstances of this case, not material to be mentioned here, said the object of the application made to him was for an order to expunge certain interrogatories, and the answers to them, upon the ground that they were leading questions. The point of the argument before him was, whether this application ought to be made to the Court, to make the order asked for, or whether it ought not to have been at once referred to the Master. He had diligently looked out for precedents, but had not been able to find even a single one in which such an application had been decided by this Court, without reference to a Master. Reluctant as he was to put the parties to such expense, he still felt bound to follow the usual course of referring the matter to the Master.

Ray v. *Mackie.* Sittings in Lincoln's Inn after Trinity term. L. C.

KING'S BENCH.

[Before the Four Judges.]

SETTLEMENT OF ESTATE.

Where a pauper's father made over to his son a copyhold estate, which he had previously mortgaged for 15*l.*, *reserving to himself and wife a right to live rent free for life on the estate:—Held, that the pauper gained a settlement by estate.*

The father of the pauper made over to the pauper a copyhold estate, which he had previously mortgaged for 15*l.*, reserving to himself and his wife a power to live in it, rent free, for their lives. The pauper lived eighteen years on the estate, and gained no subsequent settlement.

Ryland, in support of the order of sessions.—The sessions have found this to be a purchase within 9 Geo. 1, c. 7, § 5, for less than 30*l.* This is conclusive. It is clear, that the pauper's father made over to him these premises in consideration of 15*l.*

Knox and *Bullock, contrà.*—The sessions have found that there was no other apparent consideration; if there were any other consideration, the case is taken out of the statute. A conveyance from father to son, in consideration of natural affection, and 10*l.*, confers a settlement, where the real value of the estate exceeds 10*l.* *Rex* v. *Ufton*, 3 T. R. 251. The value of the estate, in this case, must have exceeded 15*l.*, as liberty was reserved to the pauper's father and mother, of residing in it for their lives. The facts are as follows: the father had encumbered the estate to the amount of 15*l.*; he says to the son, "I will give up this estate to you, as you will have it by heirship, after my death, provided you will suffer me and my wife to reside in it rent free, and pay off the 15*l.*" The life interest of the father and mother must have been worth 15*l.* Again, if an estate be mortgaged for 15*l.*, it must be worth at least 30*l.* Evidence is clearly admissible to prove a consideration ultra the consideration expressed in the deed. *Rex* v. *Scammonden*, 3 T. R. 474. As the estate must have been worth more than 15*l.* the rest of the consideration must have been natural love and affection. No consideration is expressed in the copy of court roll, as this transfer took place a year before the *ad valorem* duty attached (vide 48 Geo. 3. c. 149).

Per Curiam.—This was not a purchase within 9 Geo. 1, for less than 30*l.* The parties are a father and son. This was not a pecuniary purchase of an estate. In consideration of natural love and affection, the father transferred to his son an estate, with the burthens attached to it.

Order of sessions quashed.—*Rex* v. *Inhabitants of Hatfield Broadoak*, Saturday, May 5th, 1832.

KING'S BENCH.—PRACTICE COURT.

CERTIORARI.—SPECIAL CASE.—MANDAMUS.

Where the sessions have granted a special case, which has not been settled for more than six months after being granted, the certiorari *for removing the orders of magistrates and sessions must be sued out within six months from the time of granting the case. If it is not so sued out, this Court will not grant a mandamus to compel the sessions to enter continuances and hear the appeal.*

Whitcombe had obtained a rule for a *mandamus* to be directed to the Justices of *Staffordshire*, commanding them to enter continuances, and hear an appeal. The case, which was an appeal against an order of removal, had come on before the sessions in June, 1831, and the Court confirmed the order. On the trial it was stated by the counsel for the appellants, that a direct authority in

their favour was to be found in the books. but they were unable, during the progress of the appeal, to refer the Court to the case, On confirming the order, the Court said that the confirmation should be subject to a case for the opinion of this Court, if the appellants' counsel should be able to find and produce the alleged authority in the course of the sessions. They did so on the following morning, and the chairman expressed himself satisfied that the decision of the preceding day was wrong, and put it to the respondents to consent to the judgment of the Court being amended by quashing the order. The respondents' attorney refused to consent, and the order, therefore, stood confirmed, subject to a case.

The appellants' attorney received a draft of the case from his counsel, and sent it to the respondents. The counsel for the respondents disputed some facts contained in it, and an application was made to the sessions, on the part of the appellants, to settle the case at the January sessions following. The sessions declined doing so, because no notice of the application had been given to the respondents; but the chairman compared the case, as drawn by the appellants' counsel, with his notes, and said it was correct; and, after notice to the respondents, the same case was signed by the Court at the next Easter sessions. No *certiorari*, however, was sued out by the appellants within six months, as they are required by 13 G. 2, c. 18, s. 5.[a] The attorney for the appellants made an affidavit, that this omission arose from the attorney's delay in settling the case.

Shutt and *Greaves* shewed cause, and cited *Rex* v. *The Justices of Sussex*.[b] The marginal note of that case was in these terms:—"A *certiorari* to remove an order of sessions, confirming an order of removal, subject to a case to be stated, must be applied for within six calendar months after making the order of sessions, and not within six months after settling the case." It may be said that the decision of the sessions was not absolute, but conditional:—but though conditional at first, it became absolute in six months, unless a *certiorari* was sued out within that period. Being absolute, the Court would not interfere with the decision of the sessions. (*Rex* v. *The Justices of Worcestershire*, 1 Chit. Rep. 649; *Rex* v. *The Justices of Monmouthshire*, 4 B. & C. 844.) The proper course should have been, to have sued out the *certiorari* immediately after granting the case, although it was not then settled. That was the constant practice at every Sessions. The application in the present case had been made on the authority of *Rex* v. *The Justices of Suffolk*.[c] The marginal note of that case was this:—"Where the quarter sessions have confirmed an order of removal, subject to a case for the opinion of the Court of King's Bench, and the justices cannot agree for several sessions on the terms of the case, this Court will grant a *mandamus*, commanding them to enter continuances, and hear the appeal; for the order of sessions being only conditional, there is no decision, unless the case is returned." But, in that case the *certiorari* had been issued within the six months. It having issued, no judgment could be pronounced, unless the case were signed and sent up, or the sessions reheard it. That case, therefore, did not support the application.

Whitcombe, *contrà*. From the circumstances under which the sessions granted this case, they clearly acknowledged that their judgment, as it stood, was wrong; granting a *mandamus* was the only means of setting it right. This, therefore, was one of those cases, in which, if the Court saw justice could not be done without granting a *mandamus*, they would grant it. It was said, that it was too late to sue out a *certiorari*. That might be so in ordinary cases, but a *mandamus* could only be obtained where the ordinary remedies failed; for, that was an extraordinary remedy. Here the ordinary remedies had failed, and therefore this case stood on the same footing with all others, where the intervention by *mandamus* is sought. He contended that *Rex* v. *The Justices of Suffolk*, was precisely in point. The judgment of *Parke*, J., contained this passage:—"If there has been no improper delay, I think a *mandamus* ought to go to the justices, to enter continuances to hear the appeal, for they have not absolutely decided it." Here the appellants had been guilty of no "improper delay;" they had been amused by frivolous objections and delays, and therefore they were entitled to the same assistance which the Court granted in *Rex* v. *The Justices of Suffolk*. He also cited *Rex* v. *The Justices of Sussex*,[d] and the case of *Rex* v. *Pembrokeshire*,[e] as cases in point.

Patteson, J.—It seems to me that this case differs from all those which have been mentioned, but I will give my opinion to-morrow morning. I think that this is nothing more than an attempt to cure the laches of the party who ought to have sued out the *certiorari*, in not suing it out. All the cases stated are where the sessions had done something wrong. Here the sessions have done all they could. In *Rex* v. *The Justices of Pembroke*, all the steps the party could take, had been taken.

Cur. adv. vult.

June 13th.

Patteson, J.—I am clearly of opinion that I ought not to make this rule absolute. *Rex* v. *The Justices of Suffolk*, which was relied upon in support of this rule, is quite different from the present case. There, a *certiorari* had been sued out in due time, and that is the ground on which, I think, the present is distinguishable from all former cases. In all the cases where the Court had interfered by *mandamus*, such proceedings had been

[a] 1 Chit. Stat. 133.
[b] 1 M. & S. 734.
[c] 1 Dowl. Prac. Rep. 163.
[d] 2 Bott. P. L. 751, ed. 5.
[e] 2 B. & Adol. 391.

taken by the appellant, that if the case had been settled, the matter might be discussed in this Court. Now, if the case here had been actually settled by the parties at the proper time, no *certiorari* having been issued, it could not have been brought before the Court. It was clearly the duty of the appellant to sue out a *certiorari*, whether the case was settled or not. If he chooses to let the six months pass, he does so at his peril. The effect of making this rule absolute, would be to make good the laches of the appellant, and would be to do that circuitously, which he could not do directly. It would be the same in effect as if we were to issue a *certiorari* after six months had expired. The rule must be discharged, with costs, as it is a novel application.

Rule discharged, with costs.—*Rex* v. *The Justices of Staffordshire*, T. T. 1832, K. B. P. C.

ATTORNEY AND CLIENT.—POSTEA.

Where a defendant is entitled to enter a suggestion, under the Middlesex Court of Requests Act, the plaintiff is bound to find the record, or be answerable for the default of the attorney who withholds it.

Thesiger shewed cause against a rule calling on the plaintiff to deliver up the record, in this case, to the defendant, in order to enable him to enter a suggestion to give the defendant double costs, under the Middlesex Court of Requests act,[a] the plaintiff having only recovered a sum of 1*l.* 18*s.* The record in this case is in the possession of the plaintiff's attorney; and the plaintiff does not know where the attorney is. The plaintiff therefore is quite unable to do what is required by the rule.

Platt, *contrà*, submitted, that the effect of the defendant being unable to obtain possession of the record, would be to deprive him of all benefit resulting from the authority which the Court had granted him, to enter a suggestion for double costs.

Patteson, J.—The plaintiff is answerable for his attorney. The present rule ought therefore to be made absolute. If he does not comply with it, and an attachment is moved for, we may hear his excuse then.

Rule absolute, with costs. *Jones* v. *Harris*, June 7, 1832. K. B. P. C.

ANSWERS TO QUERIES.

COMMON LAW.

WASTE. P. 352.

There is no act of parliament relating to the case of your correspondent W. M.; but I refer him to the case of *Steel* v. *Prickett and others*, 2 Stark. 463, as it bears directly in point; wherein, from the judgment of Lord Chief Justice *Abbott*, it is decided, that "waste lands adjoining public highways, must be presumed to belong to the owner of the adjoining land, and not to the lord of the manor."

T. T. P.

STATUTE OF LIMITATIONS. P. 335.

The estate in mortgage is liable to the payment of both principal and interest, and cannot, on a bill brought for foreclosure by the mortgagee, be redeemed, under 7 G. 2. c. 20, or under any other authority, without payment of principal, interest, and costs. And if there be no interest paid, nor any recognition of the mortgagor's title to redeem, for the space of twenty years, he will be for ever foreclosed. Consequently, the estate in question is liable to the payment of the whole of the sixteen years' interest, but not to interest upon that interest. See Bacon's Abr. Mortgage (F). J.

LOPPING TREES. P. 352.

Whatsoever unlawfully annoys, or does injury to another, is a nuisance, and may be abated by the party aggrieved, so as he commit no riot in the doing of it; 5 Rep. 101. An action on the case would lie for nuisance of this description, as well as for that of a person affixing a water-spout in such a position as to let the water fall on his neighbour's land. Comyn's Dig. Nuisance (C). If an action were to be brought, a notice would not be absolutely necessary, unless brought against the lessee or assignee of the erector of the nuisance. To whom the loppings, in the case here put, belong, seems doubtful: in no case do I find the property belongs to the abator. There is a case, from which it might be concluded, that the law will not justify the destruction of the property abated, any further than is strictly required for its removal. See Black. Vol. 3. p. 5, last edition. J.

LAW OF LANDLORD AND TENANT.

DISTRESS BY EXECUTORS. P. 320.

At common law there were but three kinds of rent, *viz.* rent-service, rent-seck, and rent-charge; and that all other rents were reducible to these, whatever other names they might be called by. In *Bradley* v. *Wright*, 2 Doug. 627, it was considered, that a fee-farm rent might be a rent-seck or rent-charge; but that it could not be a rent-service, unless it were created before the statute *Quia Emptores*. From this, I think it may be presumed, that a rack-rent, which is only one of the full value of the tenement, may be included under the terms

[a] 23 G. 2., c. 33, s. 19.

rent-seek or rent-charge; indeed, it may be created by exactly the same means. Again, I think the statute is a remedial one, and would consequently receive a liberal construction.

J.

EXECUTOR'S LIABILITY.—DILAPIDATIONS.
P. 335.

The proper plan, in this case, for the executors to pursue, would be to obtain, if possible, from the lessor and the several legatees, a release; but if this cannot be accomplished, an assent to the assignment of the leaseholds by the lessor would be a discharge of their liability, as regards those covenants which exist by a privity of estate, but not as to those which exist by privity of contract. They must consequently, in that case, retain a sufficient sum to answer dilapidations, or run the risk of a *devastavit*.

J.

QUERIES.

LAW OF ELECTIONS.

REFORM ACT.—LIST OF FREEMEN.

The 46th section of the Reform Act directs, that the town clerk of every borough shall, on or before the last day of July in every year, make out a list of all the freemen of such borough, *who may be entitled to vote* in the election of members, &c. I wish to be informed, how far the town clerk is bound to ascertain or inquire into the "title to vote," or qualification of the freemen, in cases where it depends upon circumstances of which he has no official means of informing himself. In the borough in which the querist resides, it is essential to the qualification of the freemen, that they should be rate-payers, and resident in the borough. The fact of their being rate-payers might be ascertained by reference to the parish books; but how is the town clerk to discover who are or are not resident in the borough? To save all difficulty, he has in fact included the whole body of freemen in the list, although it is notorious that several are non-residents, and not a few of them parish paupers. Was he right in so doing? and if not, what ought he to have done?

H. H.

COMMON LAW.

SHARING IN PROFITS.—PARTNERSHIP.

A. employs *B.* (a surveyor) to make alterations about his house. *B.* applies to *C.*, a builder, to carry them into execution; as a remuneration for which, independent of the per centage, *B.* is to receive of *C.* half the profits. Is the contract between *C.*, the builder, and *B.*, the surveyor, such as to render *B.* liable (in case of *A.'s* insolvency or bankruptcy) to *C.* for the works done for *A.*? *C.* has been in no manner recognized by *A.*, any further than his making the alterations in *A.'s* house.

ALFRED B.

BASTARDY.

Does the absence of an individual for six years, or the impossibility of making a demand on him for the support of his illegitimate child during that period, give him the power of pleading the Statute of Limitations, in case an action should be brought to recover the amount paid in support of such child during that time?

ALFRED B.

PRINCIPAL AND AGENT.

A., a merchant in London, orders of *B.*, a manufacturer in the country, goods, which *B.* forwards to *C.*, his agent at a port, for shipment to *A.* *C.*, on receipt of such goods, advises *A.* that he has received them, and that he holds them on *A.'s* account until shipment, whereupon *A.* remits to *B.* the amount of the invoice. In the event of *B.'s* bankruptcy, while the goods are in *C.'s* possession, waiting for a ship, and after payment as before mentioned, could the assignees of *B.* retake possession of the goods as part of his estate, or would *C.* be held to be the agent of *A.* in the *particular* transaction, although the *general* agent of *B.*? And would the circumstance of the premises occupied by *C.* (as such general agent of *B.*) being the property of, or rented by *B.*, alter the situation of the parties as to the agency?

INQUIRER [a].

AUTHORITY OF MAGISTRATES.

It appears by recent police reports, that some of the magistrates have taken possession of property found upon and belonging to persons committed to prison as vagrants, and have directed it to be sold, and the produce applied towards the maintenance of the prisoner during his incarceration: I should feel obliged to any of your correspondents, who will state under what statute (if any) the magistrates in question ground such an order?

INQUIRER.

LAW OF PROPERTY AND CONVEYANCING.

DEVISE.

C. D. deceased, left two sons him surviving, and bequeathed by his will, his freehold house and business to his youngest son, and an ade-

[a] A reference to authorities, in support of opinions, would render them of much greater value.

quate sum in lieu thereof to his eldest son; who has since died, leaving one male child him surviving. The youngest son has also since departed this life leaving a daughter by a first marriage, and a wife and two daughters by a subsequent marriage, bequeathing by will the freehold property in question to the daughter by his first marriage, and the remainder of his property to the wife and daughters by the second marriage. Has the child of the eldest son any, and what right or title, to the freehold property in question? A SUBSCRIBER.

DOWER.—MORTGAGE.

A. mortgages his estate to *B.* in fee, to whom a fine is levied by *A.* and *C.* his wife, in bar of dower. On the mortgage being paid off, the estate is reconveyed to *A.* After such reconveyance, does *C.* again become entitled to dower out of the property? or does she, by her fine, bar all subsequent right to such interest? D.

PRACTICE.

BAIL.—COGNOVIT.—WAIVER.

A. is arrested, and gives a bail bond to the sheriff. Before the time for putting in special bail expires, the plaintiff, with the consent of the sheriff's bail, accepts a *cognovit*, payable at a time previous to which judgment could not have been obtained. Does the plaintiff, by accepting the *cognovit*, exonerate the bail to the sheriff, in case default is made in payment? or are they still liable to an action on the bond? D.

SHERIFF'S POUNDAGE.—INSOLVENT.

Can the sheriff enforce the payment of poundage on a *ca. sa.*, when the plaintiff has lost both debt and costs, by the defendant being discharged under the Insolvent Act?
G. L.

JUDGMENTS.—ISLE OF MAN.

A. has obtained a judgment in the Court of King's Bench at Westminster against *B.*, who has since fled to and taken refuge in the Isle of Man. The island was purchased by the Crown of the Duke of Atholl, who exercised *jura regalia* there—an appeal to the King of Great Britain in council lying, as it is understood, in extreme cases only. The statute of 5 G. 3. c. 26, vested the island, and its royalties and privileges (except ecclesiastical patronage and manorial rights), in the King. It is believed, that the laws and customs of the island, with regard to the recovery of debts and punishment of debtors, remain as they were previously to its being vested in the Crown. What are those laws and customs? And in what manner is *A.* to proceed, to render his judgment available in the island?
J. F.

MISCELLANEA.

ANTIQUITIES OF THE INNS OF COURT.

Gray's Inn.—At a pension here held on the 30th Jan., 23 Eliz., it was ordered, that no laundresses, nor women called victuallers, should thenceforth come into the gentlemen's chambers of this society, unless they were full forty years of age: and not send their maid-servants, of what age soever, into the said gentlemen's chambers, upon penalty, for the first offence of him that should admit of any such, to be put out of commons; and for the second, to be expelled the house.

On the 20th June, 41 Eliz., it was ordered, that thenceforth no officers of this house should keep or enjoy his office any longer than they should keep themselves sole and unmarried, excepting the steward, the chief butler, and the chief cook.

On the 17th Nov., 4 Car. I, it was ordered, that all playing at dice, cards, or otherwise, in the hall, buttry, or butler's chamber, should be thenceforth barred and forbidden, at all times of the year, the twenty daies in Christmas only excepted.

MOOT POINT.

A Roman lawyer, as the story goes,
A question of this kind did first propose:
That if a person die, and leave behind
His whole estate—the amount is here subjoin'd, 8000*l.*—
And wife with child, then 'tis his will and mind,
That of a son she should deliver'd be,
Two thirds must be his share, one third for she:
But if a daughter, then the widow's share
Must be two thirds, the daughter one third clear.
Now soon the widow is, as we do say,
Delivered of a daughter and a boy.
Now, to answer the father's will, come tell to me
How the estate (with justice) must divided be.

The Legal Observer.

VOL. IV. SATURDAY, OCTOBER 20, 1832. No. CV.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

THE GENERAL REGISTRY QUESTION, AND THE REPORT OF THE SELECT COMMITTEE.

IT is proper from time to time to inquire into the state of every great question connected with reform in our laws—to endeavour to ascertain whether any change in public feeling has taken place—to mention any additional information which has transpired relating to it, and carefully to review the soundness of the conclusions originally propounded. Amongst the subjects now before the legal world, there is none of greater importance than the General Registry of Deeds; and we have always devoted a large space to its discussion. Our readers are aware of our own opinion on the subject[a], which, however, has never been a violent one; and whenever we find a fair answer given to the reasons which we have urged to a General Registry, we shall be ready to change it.

Our readers will recollect, that in March last, this question was referred to the consideration of a select committee[b]; and the latest document on the subject is their report[c], which we promised some time ago to notice. It is understood to have been drawn up by Mr. William Brougham, the chairman of the committee, and is, of course, of much interest, and entitled to great attention. It commences by stating, that the question of a General Registry is, in the opinion of the committee, "by far the most important of all the alterations which have yet been suggested among the various reforms of the law;" and that they have taken every means of collecting information relating to it. It goes on to state, that as possession alone cannot now be evidence of title to land, which depends upon written documents, the purchaser has a right to be assured, that no instrument can exist which may defeat the apparent title which the seller presents to him; that the most obvious mode of effecting this is, by a General Registry, "which the committee would not for one moment hesitate to recommend, were they not deterred by the consideration, that practices, which the lapse of centuries has introduced, have grown up into a fabric so complicated and well established, that innovation into such a system might produce mischief, even greater than the evil which it is intended to cure;" and they therefore admit, that "unless the present evils should be found greatly to preponderate, no such change of system, however theoretically perfect, ought with propriety to be recommended." They then state the great objection to the present system, the concealment of deeds belonging to a title; and here we shall quote the Report:

"It cannot be doubted that great evils may arise from dealing with property which has already been the subject of a secret conveyance or transfer, from land being exposed to sale

[a] See 3 L. O. 136.

[b] See a list of this Committee, 3 L. O. 298.

[c] The Report of the Select Committee appointed to consider the expediency of a General Register of all Deeds and Instruments affecting Real Property in England and Wales.

without the buyer knowing with certainty who is the real owner, or offered as a security without the lender being able to ascertain how far it has been already pledged. With respect to the first of these heads, while it must be admitted that a general registration of all instruments would afford a complete cure for the evil, the committee are disposed to believe that, however alarming the idea may be of a secret or concealed conveyance, *the mischief does not exist in practice to such a degree as might be anticipated from the constantly occurring opportunities of fraud. Undoubtedly, however, cases of a secret transfer, a concealed settlement, or an unexpectedly-discovered deed or will, do not unfrequently occur.* The evil which arises from the purchaser not knowing with certainty who is the real owner,—from the possibility which attaches to every transaction with land, that there may exist some unknown deed or claim, which after a lapse of years may start into existence, and deprive the innocent purchaser of the estate which he has paid for, and to which he has a perfect moral title,—is a mischief of a most extensive description, and one which is felt in a greater or less degree in every transfer of real property which takes place in this country. The full extent and operation of this evil is not immediately obvious, and requires, therefore, somewhat fuller consideration. According to the present state of the law, no man can be absolutely certain that he has got a complete title to the estate which he has bought, notwithstanding all the vigilance and caution which he may have used before he completed his purchase. So far from being secure, it is always possible that instruments may exist which may defeat him, while he has no means whatever of ascertaining whether any such actually exist or not. The only safeguard which he has at present against such secret charges or conveyances, is a species of fictitious estate, which has nothing to do either with the possession, enjoyment, or dominion of the land."

The Report then describes at length the present practice, of procuring the conveyance or assignment of legal estates or terms for the benefit of purchasers, which is too well known to most of our readers to be particularly mentioned. The objections to this mode are stated to be, *first*, its expensiveness. "The seller must incur the expense of tracing this [the legal estate] with the same accuracy as is required in deducing the equitable interest; and the purchaser, who knows not what mesne conveyances may have been made, feels himself insecure so long as any legal estate is outstanding. * * * The bare possibility of danger, makes him seek to protect himself by securing this outstanding term; the bare possibility of danger, makes it unwise to neglect this precaution. He therefore secures it, but at a cost which is *often enormous*. If the legal estate is of the fee, the heir at law of the first trustee must be traced; if it be of a term of years, it is in the nature of a chattel interest, which vests in executors, administrators, *or legatees*. There are probates to be obtained; limited administrations to be taken out; pedigrees *without number* to be proved; and FREQUENTLY, *before the fee or term is got in, as much has been expended as would have paid the purchase money of the estate.*" This we think is greatly overstating the expense of the present system. In nine titles out of ten, there is no extra expense whatever in the conveyance or assignment of the legal estate, except a trifling addition to the length of the deed; and even that may, if brevity be required, not exceed a few lines. Perhaps in the tenth case, some trouble and expense arise from this cause; in one in a hundred cases, the trouble and expense are very considerable; but we repeat, we are not to legislate for the hundredth case, but for the ninety-nine. The committee deliberately state, that the expense of getting in the legal estate is frequently as great as the whole purchase money. Now we venture to join issue with them as to this; we deny the fact, and ask them for their proofs; certainly we find them not in the evidence appended either to the Second Real Property Report, or to their own. The objection of expence, although perhaps the best to be urged, is totally unsupported by actual practice, to say nothing of the extra expenses that a Registry would necessarily bring with it.

The other objections are as follow: "After all this care and all this cost, his legal estate may avail him nothing. What may have appeared to him, on the abstract, to be the oldest, or the only term, may turn out to be utterly useless, because a term still older has been previously assigned for the benefit of an adverse claimant, by a deed concealed from him." [But the Report admits that instances of concealed deeds are extremely rare in practice.] "By carelessness or inadvertence in preparing the conveyance, the term may have been extinguished." [This is not the fault of the present system; but would arise from individual blunder or ignorance, to the disadvantages of which any system would be liable]. "Or a court of law may presume that it has been surrendered, or that the legal estate has been conveyed." [The committee were probably not aware of the recent case of *Doe* d. *Blacknell* v. *Plowman*, 2 B. & Ad. 573, stated *ante*, p. 231, which restores the old

doctrine as to the presumption of surrenders of terms.] "But worse than all these, an equitable interest prior to his own may exist, of which he had notice, not actual notice, but constructive notice." This is merely an objection to the doctrine of equitable notice, which may easily be altered by legislative interference, without a General Registry. Now these are the only objections to the present system of protecting a purchaser, and they appear to us insufficient to authorize the substitution of a measure so questionable as a General Registry. Supposing, however, that it were introduced, we agree with the committee that it should be strictly enforced.

"It may at first sight seem unjust that a party who had actual notice of the existence of a prior unregistered deed should, by registering his own, obtain a preference over an innocent but indolent man who had paid the full value for the estate. The committee, after maturely considering this part of the subject, are however decidedly of opinion that this objection (except in the one instance of the subsequent deed being obtained by fraud) is entirely without just foundation. If it be made the law of the land that registration of the conveyance be as essential to the safety of the purchaser as enrolment now is to the validity of a bargain and sale, or the registration of a memorial to that of the grants of a life annuity, men will shape their course accordingly. It is not to be presumed that the performance of so essential a condition will be neglected in the one case, more than we find it to be in the other; and the committee apprehend that the omission ought to be visited with no more indulgence than the law now shows to a similar neglect in the case of a bargain and sale or grant of annuity. There are many cases in which it is the policy of the law to obtain its object by forfeiture (as in breach of covenant) or by penalty (as in a bill of exchange upon a wrong stamp); and if the man who ought to register neglect to do so, he ought to incur the forfeiture, or to suffer the penalty, for his own folly. The committee, however, do not conceive that by registration doing away with the doctrine of notice, actual and constructive, a party shall have the benefit of a deed obtained by fraud. A subsequent deed registered ought to prevail over a prior deed unregistered, although the party who registered the subsequent deed had notice at the time that the prior deed had been executed; but if it can be proved that the subsequent deed had been obtained by fraud, and proof of this is altogether independent of notice, registration certainly ought not to give that deed validity; and when that proof exists, the committee conceive that the registration of the fraudulent deed will not prevent a court of equity from giving that relief which the justice of the case requires."

The subsequent portion of the Report, we shall examine in our next number.

A LETTER OF ADVICE TO A YOUNG BARRISTER, RESPECTING HIS GOING INTO PARLIAMENT.

My dear young Friend,

I HAVE received your letter requesting my advice respecting your obtaining a seat in the new Parliament, and shall endeavour to give it to you to the best of my ability; and, as I am many—many years your senior, both at the bar and in years, I have some right to hope that you will attend to it. You tell me that all the other members of your sessions have started for the neighbouring towns and counties; and you, naturally enough, enquire, whether it will not be necessary to your future success at the bar, to follow their example; and you are so kind as to send me a draught of your proposed address to the electors of ———, for as yet you have not determined the target at which you are to shoot it.

Let me, then, first enquire as to the probabilities of your getting in—a point, I may observe, of some importance, in spite of the fact you mention, that all your young friends are certain of coming in. You are, I believe, under thirty, and of three or four years standing; you were always thought a clever young man; and if you had not been so fond of cricket at school, would have probably done more at Oxford, where, however, I think you took a tolerable second class. You have some business at your sessions; and at H., where your own father resides, you get some business at the assizes, besides a brief or two at some of the other towns on the circuit. You are not deficient in fluency; have a tolerable stock of assurance; and I may say, considerable talent in driving a buggy. You are, I know, quite an oracle at the parties at H.; and cut a tolerable figure at a second-rate watering place; to say nothing of your increasing connections in London, in the galloppade department. Now, far be it from me, my dear young friend, to disparage or undervalue these attainments, or the station which they have acquired for you; but I feel it my duty to say, that I have my doubts whether, by themselves, they will obtain you a seat in the British Senate.

Then a word as to your address in blank. You ring all the popular changes; but pause, at least until you have chosen your place. You properly enough commence by stating, that "having been invited, in this eventful crisis, by a numerous and respectable body of electors, you are de-

termined, however personally inconvenient to yourself, to stand forward as their instrument, to work out the great interests of freedom all over the world." This I have no objection to, nor to your next statement, which is also, of course, that "you have been met, throughout your canvass, with the most universal and flattering promises of support, which will be for ever engraven in your heart;" but pause in your details until you know your place. Thus, having not one acre of land yourself, you say, that "you have long considered the corn laws as a grievous burden upon the bulk of the community, and that you shall vote for their immediate repeal:" having no slaves, you declare, that "you consider slavery in any part of the British dominions as a national sin, and, at all risks, you are ready to vote for its instant abolition," and so on; but, however consistent, my dear Sir, this may be with your own interests, it will first be your duty to see if it be so with that of your electors. Tear up your draught address, then, and write another when you have fixed on your intended constituents.

But I will assume, that the 1000*l.*, which you say you are willing to expend, will get you a seat—which however, I doubt. I still think it questionable whether it will be of any service to you. Let me assure you, that although you may be a very clever and rising young man, you are utterly unknown beyond your own little set. I am sorry to inform you, that a barrister, if he be not first distinguished in his profession, is not much favored, either on the hustings, or in the House of Commons. If you spoke, I grieve to think, you probably would discover, that many of the members had a disagreeable rheum, and that you did not make nearly so much way as you used to do at the —— Society.

Let me, then, recommend you to keep your 1000*l.* in the 3 per cents., and abandon for the present all thoughts of Parliament. Devote yourself to your profession; become eminent in that, and every thing else will follow. If you have more time than you know what to do with, employ it in some work which may give you reputation; but do not fancy that you can arrive at this by the short cut of the House of Commons. It might merely make you ridiculous, whilst it injured your professional prospects. Be assured, in time, that you will see I am in the right, and that you will find I am, yours very sincerely,

† * †

NEW BILLS IN PARLIAMENT.

ANALYSIS OF A BILL INTITULED AN ACT TO ALTER THE LAWS NOW IN FORCE RELATING TO THE VACATING OF THE SEATS OF MEMBERS OF THE HOUSE OF COMMONS BY ACCEPTANCE OF OFFICES OF PROFIT UNDER THE CROWN.

RECITING that it is expedient the provisions for rendering void the election of members of the House of Commons accepting offices or places of profit under the Crown, contained in 6 Ann. c. 7, and 41 G. 3. c. 52, should be repealed, so far as the same extend to the offices hereinafter mentioned; it is therefore proposed to be enacted, that the said acts shall be repealed so far as the same severally extend to the offices following; (that is to say,) the First Lord Commissioner of the Treasury, the First Lord Commissioner of the Admiralty, the Chancellor of the Exchequer, the three principal Secretaries of State, the President of the Board of Commissioners for the Affairs of India, the President of the Board of Trade and Plantations, the Judge Advocate General of His Majesty's Forces, His Majesty's Attorney General for England, His Majesty's Solicitor General for England, His Majesty's Advocate for Scotland, His Majesty's Solicitor General for Scotland, the Chief Secretary to the Lord Lieutenant for Ireland, His Majesty's Attorney General for Ireland, and His Majesty's Solicitor General for Ireland.

That this Act shall commence and take effect from and after the dissolution of this present Parliament.

PRACTICAL POINTS OF GENERAL INTEREST.

No. XXXIII.

ARREST.

By the following case it is decided, that the Vice-Chancellor's Court, in Lincoln's Inn, has the well-known privilege of the Courts in Westminster Hall—that of being a sanctuary against arrest.

Mr. *Wakefield*, on behalf of a solicitor of the name of Orchard, stated that Orchard had been this morning taken in execution, either in the body of the Vice-Chancellor's Court, in Lincoln's Inn, or in the space between the outer and the inner doors, both doors being open, and while the Vice-Chancellor was sitting for the dispatch of business. The circumstance was immediately mentioned to the Vice-Chancellor, who was requested to order the discharge of the prisoner forthwith; but his Honor, doubting whether he had jurisdiction, directed the matter to be brought before the Lord Chancellor. It was admitted that Orchard was not in Court for the purpose of professional attendance, or of discharging any professional duty. Mr. *Wakefield*, after nar-

rating these circumstances, submitted, that every place, in which the Judges of the King's Superior Courts were sitting, was privileged, and that no arrest could be made in their presence or within the local limits of the place where they were administering justice; and cited Sir *William Waller's case*, Cro. Car. 373; Lord Coke's Third Institute, 141; 3 Bla. Com. 289; *Long's case*, 2 Mod. 181; *Pigot* v. *Charlewood*, Barnes, 200; *Maule* v. *Grubb*, *ib.*; *Williamson* v. *Jaques*, 3 T. R. 392; *Ex parte Lechwick*, 8 Ves. 598; *List's case*, 2 V. & B. 373. The Lord Chancellor ordered that the officer who had made the arrest should immediately attend with his prisoner. The officer being on the floor of the Court, was examined by the Lord Chancellor. He stated that he had a writ of *capias ad satisfaciendum* against Orchard; that he saw Orchard in Chancery Lane, and hastened to arrest him, but that Orchard, having observed him, ran with all the speed he possibly could, and got within the outer door of the Vice-Chancellor's Court before he could overtake him. The Lord Chancellor immediately ordered Orchard to be discharged from custody, and admonished the officer to beware of again acting in a similar manner. *In re Orchard's case*, 5 Russ. 159.

PARLIAMENTARY RETURNS

Of CRIMINALS *in* LONDON *and* MIDDLESEX,

1832.

[We have already inserted the Returns for England and Wales, and now add those of *London* and *Middlesex*.]

A Statement of the Number of Persons charged with Criminal Offences who were committed to the several Gaols in London and Middlesex for Trial during the last Twenty-one Years, distinguishing the Number in each Year.

YEARS.	NUMBER of PERSONS.		
	Males.	Females.	Total.
1811	974	508	1,482
1812	1,121	542	1,663
1813	1,229	478	1,707
1814	1,216	430	1,646
1815	1,514	491	2,005
1816	1,729	497	2,226
1817	2,157	529	2,686
1818	2,108	557	2,665
1819	2,193	498	2,691
1820	2,274	499	2,773
1821	1,998	484	2,480
1822	2,003	536	2,539
1823	1,955	548	2,503
1824	2,042	579	2,621
1825	2,228	674	2,902
1826	2,734	723	3,457
1827	2,719	662	3,381
1828	2,767	749	3,516
1829	2,763	804	3,567
1830	2,560	830	3,390
1831	2,753	761	3,514
Total	43,037	12,377	55,414

A Statement of the Number of Persons charged with Criminal Offences who were committed for Trial, and Convicted, Sentenced, Acquitted, &c. &c., in London and Middlesex, in each of the Three last Seven Years.

	In the Seven Years ending with the Year 1817.	In the Seven Years ending with the Year 1824.	In the Seven Years ending with the Year 1831.
COMMITTED for TRIAL			
Viz. Males	9,940	14,573	18,524
Females	3,475	3,699	5,203
Total	13,415	18,272	23,727
CONVICTED and SENTENCED.			
To *Death* *	* 1,108	* 1,157	* 1,189
Transportation—			
For Life	291	777	669
— 21 Years	—	—	1
— 14 Years	221	560	886
— 7 Years	2,911	3,023	4,513
Imprisonment,— and severally to be Whipped, Fined, Pilloried, kept to Hard Labour, &c. 5 Years	2	—	—
Imprisonment,— and severally to be Whipped, Fined, Pilloried, kept to Hard Labour, &c. 3 Years	4	5	6
Imprisonment,— and severally to be Whipped, Fined, Pilloried, kept to Hard Labour, &c. 2 Years, and above 1 Year	204	100	148
Imprisonment,— and severally to be Whipped, Fined, Pilloried, kept to Hard Labour, &c. 1 Year, and above 6 Mths.	884	777	597
Imprisonment,— and severally to be Whipped, Fined, Pilloried, kept to Hard Labour, &c. 6 Mths. & under	2,622	3,975	6,345
Whipping	194	297	522
Fine	598	723	736
Total *Convicted*	8,139	11,394	15,611
Acquitted	3,015	4,092	5,343
No Bills found, and *Not Prosecuted*	2,261	2,786	2,773
Total	13,415	18,272	23,727
* Of whom were *Executed*	* 130	* 170	* 109

A Statement of the Number of Persons convicted of Crimes for which they received Sentence of Death, and the Number thereof who were Executed, in London and Middlesex, in each of the Three last Seven Years.

CRIMES.	In the Seven Years ending with the Year 1817.		In the Seven Years ending with the Year 1824.		In the Seven Years ending with the Year 1831.	
	Number of Persons Sentenced to Death.	Number of Persons *Executed*.	Number of Persons Sentenced to Death.	Number of Persons *Executed*.	Number of Persons Sentenced to Death.	Number of Persons *Executed*.
Arson and other wilful Burning	2	2	3	—	2	2
Burglary	221	19	216	34	141	13
Breaking into a Dwelling House, and Larceny	52	—	96	3	277	16
Cattle Stealing	10	—	7	1	12	—
——— Feloniously Killing and Maiming	1	—	—	—	—	—
Coining	24	—	—	—	19	5
Coin, Uttering Counterfeit (*having been convicted as Common Utterers*)	14	—	1	—	15	—
Forgery, and Uttering forged Instruments	64	44	116	47	38	10
Horse Stealing	32	—	48	1	69	9
Larceny, Grand	1	—	—	—	—	—
——— in a Dwelling House, &c.	276	2	374	16	360	12
——— in a Shop, &c.	103	—	33	—	—	—
——— on a Navigable River, &c.	16	5	4	2	—	—
Letters containing Bank Notes, &c. Secreting and Stealing	8	1	4	3	3	2
Murder	25	25	7	7	9	8
——— Shooting at, Stabbing, Wounding, and administering Poison, with intent to Murder, &c.	14	4	19	8	20	4
Piracy	11	4	—	—	6	2
Rape, &c.	4	2	2	—	5	2
Robbery of the Person, *on the Highway and other Places*	180	17	171	34	147	20
Sacrilege	2	—	3	2	—	—
Sheep Stealing, and Killing with intent to Steal	20	—	21	3	27	4
Sodomy	4	4	5	4	2	—
Treason, High	2	1	11	5	—	—
Transports being at large, &c.	22	—	11	—	21	—
FELONY, *Cutting down Trees growing*, &c.	—	—	1	—	—	—
——— *Rescuing Felons*	—	—	4	—	—	—
——— *Assembling Armed to assist Smugglers*	—	—	—	—	11	—
——— *Trafficking in Slaves*	—	—	—	—	3	—
——— *Transferring a Stamp to Defraud*, &c.	—	—	—	—	1	—
Total Number of Persons in each *Seven Years*	1,108	130	1,157	170	1,188	109

REMARKABLE TRIALS.

No. XV.

CASE OF ARNAUD DU TILH, FOR IMPOSTURE (IDENTITY).

MARTIN GUERRE, of Biscay, in 1560, married Bertrand de Rols, of Artigues. In 1570, Martin having a dispute with his father, thought fit to withdraw himself, to avoid the effects of his anger, and, for eight years together, neglected to give the least notice to his family where he was.

At the end of eight years came one Arnaud du Tilh, who had exactly the features, stature, and complexion of Martin Guerre, and was acknowledged as the true husband of Bertrand de Rols, by her relations and herself. He had known Martin Guerre abroad, and learned from him all the little secrets of the family. The wife was overjoyed, and in the space of three years had two children by him.

By some means, Peter Guerre, the uncle of Martin, and some other persons, suspected the imposition, and at last opened the eyes of Bertrand de Rols. She thereupon applied to the magistrate, and caused him to be apprehended, presenting a bill of complaint against him before the criminal judge of Rieux. In his answer to the complaint, Arnaud du Tilh exclaimed against the wicked conspiracy which his relations and his wife had formed against him. He said that Peter Guerre had made up this business merely out of covetousness, and with a view to possess himself of his effects; that he had drawn in his wife, through the weakness of her understanding, to be a party in this black affair. He submitted to a long examination before the criminal judge, who interrogated him as to matters which happened in Biscay, the place of Martin Guerre's birth, his father, his mother, brothers, sisters, and other relations, as to the year, month, and the day of his (Martin Guerre's) marriage, his father-in-law, mother-in-law, the persons who were present at the nuptials, those who dined with them, their different dresses, the priest who performed the ceremony, all the minute circumstances that happened that day and the next, even to naming people who were present when they were put to bed.

The court now ordered Bertrand de Rols, and several other persons whom the accused had cited, to answer interrogatories. Bertrand answered in a manner which agreed exactly with all that the impostor had advanced, except that she related the story of his being *bewitched* for eight or nine years, which he had omitted. The accused was then questioned as to that point, and his replies were such as tallied exactly with what Bertrand had said: he repeated all that had been done to free him from that enchantment. He was next confronted with Bertrand, and with all the witnesses, upon which he demanded that she might be kept safely and apart from his enemies, which was granted. But at the same time, an inquisition was taken at Pin, at Sagias, and at Artigues, of all the facts which concerned Martin Guerre and the accused, Bertrand de Rols; and all the discoveries consequent on these proceedings were favorable to Bertrand de Rols.

As to the accused, of nearly one hundred and fifty witnesses that were examined, between thirty and forty deposed, that he was the true Martin Guerre; that they had known him, and conversed with him from his infancy; that they were perfectly acquainted with his person, manners, and tone of voice; and that they moreover were convinced of the truth of what they asserted, by the observation of certain scars and secret marks, which it was impossible for time to efface.

On the other hand, a great number of witnesses deposed positively, that he was Arnaud du Tilh, and that they were perfectly acquainted with his person, manners, and voice. The rest of the witnesses, to the number of sixty and upwards, declared that there was so strong a resemblance between the two persons concerned in this matter, that it was impossible for them to determine whether the accused was Martin Guerre or Arnaud du Tilh.

However, the judge thought proper to pronounce a definitive sentence: "That Arnaud du Tilh is guilty, and convicted of being an impostor, and is condemned to lose his head, and his body divided into four quarters."

From this sentence Arnaud du Tilh appealed to the parliament of Thoulouse, and this assembly ordered the parties to be confronted in open court. On this occasion, the accused maintained so steady a countenance, spoke with such an air of assurance and truth, and answered every question with such quickness, that the members were induced to think he was the true Martin Guerre; while, on the other hand, the terror and confusion of Peter Guerre and Bertrand de Rols was so great, that they created evidence against themselves. Thirty new witnesses were examined; nine or ten of these were positive that he was the true Martin Guerre; seven or eight were as positive that he was Arnaud du Tilh; the rest having weighed all circumstances, and being afraid of injuring their consciences, declared plainly that they were not able to say which he was.

It appeared, that forty-five witnesses had affirmed, in terms the most express, that he was not Martin Guerre, but Arnaud du Tilh, which they said they were the better enabled to do, because they had known both persons intimately, ate and drank with them, and conversed constantly with them from their very childhood; nay, some of them went still farther:—Carbon Barreau, uncle, by the mother's side, of Arnaud du Tilh, acknowledged that he was his nephew, and observing the irons that were upon his legs, cried bitterly, and bewailed his misfortune, in having a relation i such a condition. He said also, that he la

in his life-time been concerned in several contracts with his nephew, and he actually produced those writings signed by Arnaud du Tilh.

Most of these witnesses agreed, that Martin Guerre was taller, and of a darker complexion; that he was slender, his legs a little crooked, stooping in the shoulders, his nose large and flat, the mark of an ulcer in his face, and a scar in his right eye-brow; whereas Arnaud du Tilh was a dapper well-set man, his legs large and full, and he had neither a flat nose, nor was his chin crooked; but in his face, indeed, he had the same marks with Martin Guerre. The shoemaker who used to make shoes for Martin Guerre, deposed that Martin's foot reached to the twelfth mark, whereas the foot of the accused reached no farther than the ninth mark upon his rule. Another witness swore that Martin Guerre was dexterous in wrestling, whereas this man knew nothing of the matter. John Espagnol, who kept a public-house, declared that the accused acknowledged to him that he was not Martin Guerre.

Valentine Rougie deposed, that the accused, perceiving that he knew him to be Arnaud du Tilh, made a sign to him with his finger, for silence. John de Liberos deposed to the same effect, and added, that the accused gave him two handkerchiefs, with a strict charge to give one of them to John du Tilh, his brother. There were also some hearsay evidences produced. Two persons swore that a soldier of the regiment of Rochfort, passing through Artigues, was surprised at seeing the accused assume the name of Martin Guerre, declaring aloud, and without ceremony, that he was a notorious impostor, for that Martin Guerre was actually in Flanders, and had a wooden leg, in the place of one he lost before St. Quintin, in the battle of St. Laurence. It was also remarked, that Martin Guerre, being a Biscayner, had the tone of his country, the Bask being a language very different not only from French, but from the Gascon, whereas the accused could not speak the Bask, but took pains to mingle a few words which he had learned of it with his French, repeating them with a visible affectation.

On the other hand, there were thirty or forty witnesses who swore positively that he was the true Martin Guerre; that they knew him intimately, and remembered him from his childhood. Among these were the four sisters of Martin Guerre, who were brought up with him, and who had the reputation of being women of good sense; two of their husbands, brothers-in-law to Martin Guerre, were likewise of the number. Such as were present at the nuptials of Martin Guerre and Bertrand de Rols, deposed in favor of the accused. Catherine Boere, in particular, said, that when she carried the posset after they were in bed, she saw Bertrand's spouse, and that the person now accused was the same. All, or at least the greatest part of these witnesses agreed, that Martin Guerre had two strokes under his eye-brow, that his left eye was blood-shot, the nail of his first finger crooked, that he had three warts on his right hand, and another on his little finger; all of which were seen on the accused.

It was alleged also in his favor, that Bertrand de Rols never had it in her own mind to accuse him; but was persuaded, and even frightened to it by others. Peter Guerre had married her mother, and these two having conceived a spleen against the accused, did all they could to set him and Bertrand at variance; that by the contrivance of these persons, the accused was once taken up before for a crime of which he was not guilty, and that upon his being discharged and coming home, his wife received him with all possible kindness, gave him a new shirt, washed his feet, and went to bed to him, where all things passed between them which is usual among married persons; and yet the next morning he was hurried to prison by Peter Guerre, by virtue of a paper signed by Bertrand de Rols the night before, that is the night in which she had expressed all this fondness for him; nay, that she had discovered her tenderness since his being in prison, by sending him money and clothes.

The parliament still continued in doubt, and considering the nicety of the case, and the consequences of annulling a marriage, and illegitimating a child, began to incline to the accused, and thought of reversing the judgment of the inferior judge, when on a sudden, as though he had dropped from the clouds, *Martin Guerre himself appeared, having a wooden leg, as the soldier had said.* He asserted that he came from Spain; gave a distinct account of the impostor, who had taken his name, and presenting a petition to the parliament, demanded that he might be heard. Upon this, the court gave directions that he should be kept in safe custody, submit to an interrogatory in form, and be confronted with the accused, with Bertrand de Rols, with his sisters, and with the principal witnesses, who had deposed in favor of the accused. He was interrogated as to the same facts on which the accused had been questioned, and his answers were true; but they were neither so clear, so positive, nor so exact, as those given by the accused.

When he came to be confronted with Arnaud du Tilh, he treated Martin Guerre as an impostor, as a fellow picked out by Peter Guerre to support this character and take away his life; he even proceeded so far as to say, in a high tone, that he would be content to be hanged, if he did not unravel the whole mystery, and prove all his enemies cheats. He then asked Martin Guerre abundance of questions, as to several of his transactions, to which Martin answered with some confusion; but the commissioners, having directed Arnaud du Tilh to withdraw, put several questions to Martin Guerre, and his answers were very full and satisfactory; then they called for Arnaud du Tilh, and questioned him as to the same points, to the number of ten or twelve; and all his replies were so clear, and so correspondent to what

Martin Guerre had said, that some began to think there was witchcraft in the business.

The court directed that, both the persons being present, the four sisters of Martin Guerre, the husbands of two, the chief of those witnesses who were obstinate in owning the accused for Martin Guerre, should be called in, and obliged to point out him whom they now judged to be *the true Martin*. Accordingly, all these persons appeared, except the brothers of Arnaud du Tilh. The first was the eldest of the sisters, who, after she had looked upon them a moment, ran to Martin Guerre, embraced him, and having let fall a shower of tears, addressed herself to the commissioners in these words, "See, Gentlemen," said she, "my brother, Martin Guerre; I acknowledge the error into which this wicked man (pointing to Arnaud du Tilh) drew me, and many other of the inhabitants of Artigues, and in which, by a multitude of artifices, he has made us persist."

Martin mingled his tears with those of his sister, and received her embraces with the utmost affection. All the rest knew him as soon as they saw him, and there was not one of all the witnesses who did not declare that Arnaud du Tilh was an impostor.

Bertrand de Rols no sooner cast her eyes on her husband, than she turned pale, and burst into tears; she approached him slowly, fell at his knees, and taking hold of his hand, after some moments, addressed herself to him in words the most feeling. She said it was the error of his sisters that was the original cause of her misfortune; and that the strong passion she had for her husband had assisted the cheat.

No doubt now remaining as to the guilt of Arnaud du Tilh, the court condemned him "to make *amende honorable* in the market-place of Artigues, in his shirt, his head and feet being bare, a halter about his neck, and holding in his hands a lighted torch; to demand pardon of God, the king, and the justice of the nation, of the said Martin Guerre, and de Rols his wife; and then to be delivered into the hands of the executioner, who after making him pass through the streets, and other public places in the said town of Artigues, with a rope about his neck, shall bring him before the house of the said Martin Guerre, where, on a gallows, he shall be hanged and strangled, and afterwards burnt."

Arnaud du Tilh was carried back to Artigues, and being examined by the criminal judge of Rieux, who first condemned him, he made a very long confession. He stated, that he was determined to commit this crime when coming from the camp in Picardy; he was mistaken for Martin Guerre by some of Martin's friends; and from whom he learned abundance of circumstances concerning Martin's father, wife, sister, and other relations, and of every thing he had done before he left that country. [*From les Causes Célèbres.*]

LEGAL BIOGRAPHY.

No. II.

SIR JAMES MACKINTOSH.

(*Concluded from p.* 374.)

We have prolonged, beyond our original intention, the notice of the *Speeches* and *Writings* of Sir James Mackintosh; but their important bearing on public and legal affairs affords, we trust, a sufficient excuse. The incidents of his *Life* (like those of most intellectual persons) might have been compressed into a narrow compass. Of that which he has said and written, our account, full as it has been for a work of this nature, is necessarily imperfect, and we hasten to conclude with a review of his principal *literary labors*, so far as they have yet been published.

In the years 1830 and 1831, he was occupied in writing the History of England, for Dr. Lardner's Cyclopædia. This "Manual," as he termed it, is an admirable epitome of the most interesting portions of our history. The selection of the topics on which he has enlarged is particularly judicious. It was necessary that the book should not be a mere record of facts and dates, but a concise survey,—at once popular and philosophical,—of the great events and transactions which distinguished each age or reign. The task of such a selection was the most difficult part of the undertaking; and we notice its execution as one that cannot fail to be beneficial to the legal student. Sir James, as a legislator and constitutional lawyer, has naturally brought into prominent observation whatever can interest the minds of those who are engaged in the study of the laws of their country.

Thus the first introduction of the study of the Roman law, by Vacarius, at Oxford, about the middle of the twelfth century, is noticed, and several learned notes are added to the text, which may enable the student to pursue his course according to the bent of his genius [a]. The Great Charter of John,—its provisions, and lasting effects, and its confirmation under Henry the Third, are dwelt upon as fully as the plan of the work would admit, and proportioned to the importance of the subject. The origin and gradual formation of the House of Commons comes next under revision; and to this succeeds a notice of the perfecting of the Trial

[a] Vol. I. pp. 172, 357.

by Jury. Under the reign of Edward the First is also classed a valuable commentary on the Common Law. The Statute of Treasons (25 Edw. 3) is the subject of a brief but characteristic eulogy. The emancipation of the Serfs, and other steps in the general advancement of the liberties of the people, of course, peculiarly attracted the attention of the historian; and the rights of the Commons, and the extent of the elective franchise, are especially observed upon. Nor are the arts or literature of the several successive ages unnoticed. The progress in these is philosophically marked, in connection with passing events and the general movement of society. His literary taste prevented him from neglecting any of the romantic incidents which mark the early pages of our history, or the striking events which in modern times affect the welfare of mankind.

In proceeding to close this portion of our review, we feel bound to submit to our readers some specimens of our author's style; and we select for this purpose those portions of the work which are attractive, not only to the members of the profession, but to all classes, from their relation to the immediate condition of public affairs. We may, in particular, select his remarks on the rights of Property in relation to the *Church*:

"Property is legal possession. Whoever exercises a certain portion of power over any outward thing in a manner which, by the laws of the country, entitles him to an exclusive enjoyment of it, is deemed a proprietor. But property, which is generally deemed to be the incentive to industry, the guardian of order, the preserver of internal quiet, the channel of friendly intercourse between men and nations, and, in a higher point of view, as affording leisure for the pursuit of knowledge, means for the exercise of generosity, occasions for the returns of gratitude; as being one of the ties which join succeeding generations, strengthening domestic discipline, and keeping up the affections of kindred; above all, because it is the principle to which all men adapt their plans of life, and on the faith of whose permanency every human action is performed; is an institution of so high and transcendant a nature, that every government which does not protect it, nay, that does not rigorously punish its infraction, must be guilty of a violation of the first duties of just rulers. The common feelings of human nature have applied to it the epithets of sacred and inviolable. Property varies in the extent of the powers which it confers, according to the various laws of different states. Its duration, its descent, its acquisition, its alienation, depend solely upon these laws. But all laws consider what is held or transmitted agreeably to their rules as alike possessing the character of inviolable sacredness. There may be, and there is, property for a term of years, for life, or for ever. It may be absolute as to the exercise of the proprietor's rights, or it may be conditional, or in other words, held only as long as certain conditions are performed. There are specimens of all these sorts of property in the codes of most civilised nations. But in all these cases the essence of property is preserved, which consists in such a share or kind of power as the laws confer. The advantages may be extremely unequal. The inviolable right must (by the force of the terms) continue perfectly equal.

"The legal limits of the authority of the supreme legislature are not a reasonable object of enquiry nor indeed an intelligible form of expression. But to conclude that, because the law may, in some sense, be said to create property, the law is to be deemed on that account as entitled rightfully to take it away, is a proposition founded on a gross confusion of two very distinguishable conceptions. It uses the word property in the premises for a system of rules, and in the conclusion for a portion of external nature, of which the dominion is acquired by the observance of these rules. It is only in the first of these senses that property can truly be called the creature of the law. In the second sense it is acquired or transmitted not by law but by the acts of a man when the acts are conformable to legal rules. It is impossible within our present limits to canvass the small or apparent objections which may occur to this scheme of reasoning. It is sufficient, perhaps, here to remark, that these are the generally acknowledged principles, and that deviations from them in practice are no more than partial irregularities, to which the disturbing forces of passion and intolerance expose human society.

"The clergy, though for brevity sometimes called a corporation, were rather an order in the state composed of many corporations. Their share of the national wealth was immense, consisting of land devised by pious men, and of a tenth part of the produce of the soil, set apart by the customary law of Europe, for the support of the parochial clergy. Each clergyman had only in this case an estate for life, to which during its continuance the essential attribute of inviolable possession was as firmly annexed by law as if it had been perpetual. The corporate body was supposed to endure till it was abolished in some of the forms previously and specially provided for by law."

* * * * * *

"We are assured by Sir Thomas More, 'that in all the time while he was conversant with the court, of all the nobility of this land he found no more than seven who thought it right or reasonable to take away their possessions from the clergy.' So inconsiderable was the original number of those who, not many years after, accomplished an immense revolution in property.

"To which it must be answered, that the observance of justice is more necessary than security for any institution; that many regulations might have stood instead of one deed of

rapine; that the milder expedients would have provoked fewer and more reconcilable enemies; that if, on the whole, they afford less security, the legislature were at least bound to try all means before they who were appointed to be the guardians of right set the example of so great a wrong. Rulers can never render so lasting a service to a people as by the example, in a time of danger, of justice to formidable enemies, and of mercy to obnoxious delinquents. These are glorious examples for which much is to be hazarded."

We add one more extract, as applicable to Parliamentary Reform. Sir James considers that some direct benefits resulted to the constitution during the reign of Henry the Eighth.

"The act which established a parliamentary representation in so considerable a territory as Wales, may be regarded as the principal reformation in the composition of the House of Commons since its legal maturity in the time of Edward I. That principality had been divided into twelve shires; of which eight were ancient, and four owed their origin to a statute of Henry's reign. Knights, citizens, and burgesses were now directed to be chosen and sent to parliament from the shires, cities, and burghs of Wales. A short time before, the same privileges were granted to the county palatine of Chester, of which the preamble contains a memorable recognition and establishment of the principles which are the basis of the elective part of our constitution. Nearly thirty members were thus added to the House of Commons on the principle of the Chester bill: that it is disadvantageous to a province to be unrepresented; that representation is essential to good government; and that those who are bound by the laws ought to have a reasonable share of direct influence on the passing of laws. As the practical disadvantages are only generally alleged, and could scarcely have been proved, they must have been inferred from the nature of a House of Commons. The British constitution was not thought to be enjoyed by a district till a popular representation was bestowed on it. Election by the people was regarded, not as a source of tumult, but as the principle most capable of composing disorder in territories not represented."

It is greatly to be regretted that Sir James did not survive to complete the design even of this abridged history—to the larger composition of which he had long committed his reputation. As the events of recent times continued to increase in interest by their more immediate connection with the affairs of the present day, the narrative would have gained at each step additional importance. We hope the materials are left behind for continuing the work to a later period than that at which it terminates, in 1558.

Another publication of Sir James Mackintosh, which preceded the more important work we have just noticed, was his "Life of Sir Thomas More." We gave an account of that production in vol. III. p. 20. We give the preference, as a composition, to the last Book, which is marked by a more equal style than its predecessor.

After the remarks which we have interspersed in the previous articles, it is superfluous to dwell further on the attainments and character of Sir James. We add only, therefore, the few particulars which we have collected, in reference to what may be termed his domestic life.

In 1789 he was united to Miss Stuart, the sister of Mr. Charles Stuart, author of several dramatic pieces. This lady died in 1797, leaving three daughters, the eldest of whom was married to C. J. Rich, Esq., Resident at Bagdad; the second to Sir William Wiseman, Bart.; and the third to Mr. Erskine, of Bombay. His second marriage was with Miss Allen, and took place in the year 1798; and by this lady he had one son and two daughters. He died at his house in Langham Place, on the 30th of May, 1832; and was then in his 67th year.

He was a Commissioner of the India Board, and in right of his judicial services as Recorder of Bombay, was in receipt of a pension of £1200 a year from the East India Company. Before his appointment as Recorder of Bombay, he held for upwards of a year the Professorship of General Polity and Laws in the East India College at Hertford. He was a Doctor of Civil Law; and the estimation in which he was held was testified by his election as Lord Rector of Glasgow, both in 1822 and 1823. He enjoyed also the distinction of being one of His Majesty's Privy Councillors.

SUPERIOR COURTS.

LORD CHANCELLOR'S COURT.

INJUNCTION.

An injunction is granted by the Vice Chancellor to restrain trustees of a turnpike gate from taking out execution on a judgment obtained against a surety of the toll-renter, for the amount of the deficiency of his payments. The surety having sworn positively, that on signing the memorandum of security, he told the clerk of the trustees that he did so in the understanding that

another person was to be co-surety with him, this Court continues the injunction.

This was a motion to discharge an order of his Honour the Vice-Chancellor, in which he refused to discharge an injunction to restrain the defendants, Bell and others, the trustees of a turnpike, from following up judgment against the plaintiff. It appears that the trustees had, under the act, put forth a notice of the terms on which the tolls were to be let, one of which was, that the renter should procure two sufficient securities. A person of the name of Nixon offered himself, and stated that the plaintiff would be his surety. This statement was satisfactory, and a memorandum was made. Of this the plaintiff knew nothing, until he was informed of it by Nixon, after it occurred, on which he wrote to the trustees saying, he had no objection to being bound with another sufficient person. The trustees sent their clerk to the plaintiff with the memorandum, which he signed, on the positive affirmation, according to his affidavit, that another person of the name of Milborne would also sign. An action was subsequently brought against the plaintiff, as sole surety for 200*l.*, for which Nixon was a defaulter, and the plaintiff allowed judgment to go by default. The trustees, in their answer, state that Nixon apprised them that he had the plaintiff's authority to propose him for his surety, that the plaintiff was Nixon's father-in-law, and that he had been surety for him more than once before; and they denied having given their clerk any instructions that Milborne would sign with the plaintiff. If the plaintiff's account was true, it would be very hard to oblige him to pay the whole amount of the security. As there was no reason to think otherwise, his Lordship felt bound to continue the injunction.

Davidson v. *Bell.* Sittings in Lincoln's Inn after Trinity Term. L. C.

KING'S BENCH.

[Before the Four Judges.]

NOTICE OF APPEAL.—WAIVER.

Where a sufficient number of days notice of appeal has not been given, and the appeal is adjourned at the instance of the appellant, with the consent of the respondents, and the costs are paid by the appellant, the receipt of those costs is a waiver of the irregularity in the notice.

At the Michaelmas sessions for the western division of the county of Kent, 1831, Morrell appealed against a rate. When the appeal was called on, the counsel for the appellant applied to the Court to respite the appeal to the Epiphany sessions, on payment of costs, as Morrell was unavoidably absent. To this the respondents consented. At the Epiphany sessions, 1832, the Court of Quarter Sessions refused to hear the appeal, as it was objected by the counsel for the respondents, that eight clear days notice of appeal had not been given previous to the Michaelmas sessions, as was required by the practice of the sessions. A rule *nisi* was obtained in Hilary term, for a *mandamus* to the justices of Kent, to enter continuances and hear the appeal.

Campbell and *Walsh* now shewed cause.—The appellant was bound to give eight clear days notice of appeal before the Michaelmas sessions. He was bound also to give the same notice of trying his respited appeal at the Epiphany sessions (*Rex* v. *The Justices of Salop*, 2 B. & A. 694), especially as it was respited at the instance, and for the benefit of the appellant (*Rex* v. *The Justices of Buckinghamshire*, 6 D. & R. 142). As neither notice was given, the sessions have done right in dismissing the appeal.

Adolphus, contrà.—The notice of appeal is regulated by statute 17 G. 2. c. 38. At the Michaelmas sessions, it was competent for the respondents to waive the notice; and that they have done, as they did not then make the objection. As the costs were paid by the appellant, and received by the respondents, and the order made with the consent of both parties, this was a sufficient notice of the intention to try the respited appeal at the Epiphany sessions.

Per Curiam.—The Court of Quarter Sessions decided at the Epiphany sessions what they could have decided at the Michaelmas sessions. After receiving the costs, it was not competent to set up the previous irregularity.

Rule absolute.—*Rex* v. *Justices of Kent*, May 11th, 1832.

SETTLEMENT BY RENTING A TENEMENT.

Where a pauper marries a woman, who has taken a house at 6l. a year, since the passing of the 59 G. 3, and before the passing of the 6 G. 4, he acquires no settlement by such marriage.

Order of removal from Winchcombe to North Cerney; order confirmed by the sessions. The pauper's wife took a house in Winchcombe for a year, from Michaelmas, 1827, to Michaelmas, 1828, rent 6*l.* per annum. She resided in it till July 23d, 1828, when she married the pauper, and they both continued to reside in it till the expiration of the year. One half-year's rent was paid by the wife, and the last half-year's rent by the pauper. The question was, whether by the marriage of the pauper, a settlement was gained by him and conferred on his wife and children.

Justice and *J. Talbot*, in support of the order of sessions.—The words of the 59 G. 3. c. 50, are, that no one shall acquire a settlement by renting a tenement in any parish, unless such tenement shall be *bonâ fide* hired at and for the sum of 10*l.* The pauper's wife took the house at 6*l.* per annum. It was her own act, and the act of marriage cannot confer upon her husband what she had not, and what she could not have acquired. The cases of *Rex* v. *Kennington*, Burr. S. C. 566, and *Rex* v. *Stone*, 6 T. R. 295, were all previous to the statute 59 G. 3. c. 50.

Per Curiam.—This case is not distinguishable from the case of *Rex* v. *Kennington*.

Rex v. *Inhabitants of North Cerney*.—Order of sessions quashed, April 28th, 1832. K.B.F.J.

KING'S BENCH.—PRACTICE COURT.

LEVARI FACIAS.—SEQUESTRATOR.

A defendant has no right to have a writ of levari facias de bonis ecclesiasticis *returned, but may have a return of the amount of profits received by the sequestrator.*

Kelly shewed cause against a rule for taking the Archbishop of York's return to a writ of *levari facias* off the file, issuing a *distringas*, and making the Archbishop pay the costs of the application. The application was made on the part of the defendant; and he states, that a sequestration issued against him, and that a sequestrator entered into possession of his benefice. After receiving the profits for some time, a sum of money came into the sequestrator's hands, from which he claimed deductions in his own favor. After this, the Archbishop was ruled to return the writ. His Grace did not return the writ, but returned the sequestrator's accounts. This return, it was sought now to take off the file, on the ground that objections existed to the sequestrator's account. In answer to this, we say, that though we are perfectly ready to put these accounts into a course of inquiry, the Court has no power to command the Archbishop to return the writ; for it is a continuing writ. If the Archbishop were to return the writ, his authority would be at an end. He cited *Marsh, knt. and others* v. *Faucett, clerk*.[a] The marginal note of that case is this: "Though a *levari facias de bonis ecclesiasticis* is a continuing execution, and a levy may be made under it from time to time, *after it is returnable*, till the sum indorsed be satisfied, yet if it be *actually returned*, the authority of the Bishop is at an end. Therefore, where such a writ remained in the hands of the Bishop long after it was returnable, who sequestered the profits of a vicarage, accruing as well before the return-day as after, and being ruled to return the writ, returned only the amount of the sum levied up to the *return day*, the Court would not order the writ and return to be taken off the file, but would only permit the return to be amended by inserting the sum levied up to the time when the writ was *actually returned*. The proper course of proceeding is to rule the Bishop from time to time, to know what he has levied." Whatever right, therefore, may be possessed to oblige the Archbishop to return what has been levied, the defendant can have no right to have the writ returned. If, at the suggestion of the defendant, the writ could be returned, and thus an end put to the execution, the situation of the plaintiff might be very much altered. The plaintiff might come to the Archbishop and say that the writ had been returned, not at his instance, for he wished the execution to continue.

Patteson, J.—The defendant has no right to have the writ returned. The plaintiff has a right to put an end to his own execution, but the defendant has not.

Shee, contrà, submitted that he was entitled to have the rule made absolute. The Archbishop had been ruled last term to return the writs of *levari facias* issued in these causes, and expressly to state in his return "what amount he had levied, and what had been the costs and charges of such levy." This rule was obtained on affidavits, stating that the full sum indorsed on the writs had long since been levied, and that a balance remained in the hands of the sequestrator, who is the plaintiff's attorney; the balance he claimed to retain on account of a debt due to him by the defendant. Instead of obeying the rule, the Archbishop sent back the writs, with an indorsement on one of them, stating that certain accounts, which he annexed, had been delivered into the Ecclesiastical Court of York by the sequestrator. These accounts had been exhibited in a suit instituted in the Archbishop's Court by the defendant, to obtain a re-taxation of the sequestration. It appeared from them that the whole accounts indorsed on the writs had been levied, though they only came down to January 1831, and the sequestrator took credit in them for sums to which he was clearly not entitled, being due to him (if at all) on a private account between him and the defendant. The full Court were clearly of opinion that this was no return at all, and thereupon granted the present rule. It was not doubted by the learned Judge (Mr. J. *Taunton*) who granted the original rule, nor by the Judges in the full Court, that the defendant was entitled to call upon the Archbishop to return the writs, on an affidavit that the sums indorsed upon them had been levied. There is no authority for saying that the Archbishop is not compellable to return the writ of *levari facias* at the instance of the defendant. It is true that this is a continuous execution; and that is an additional reason why the defendant should have this remedy; for otherwise the writ, unlike other writs, remaining in force after the return-day, the sequestrator may continue in receipt of the profits of the benefice long after the sum endorsed on the writ has been levied. There can be no injustice to the plaintiff in sanctioning the practice; for the rule can only be obtained on affidavits that the judgment is satisfied; and as the Archbishop is bound to levy the whole sum indorsed on the writ, the defendant's affidavits may be answered on shewing cause, and his rule made absolute, or discharged, on the usual terms. The case of *Marsh, knt. and others* v. *Faucett, clerk*, decides nothing contrary to this. There, no doubt, the proper course—that is, the most advisable course—would have been to rule the Bishop from time to time, to know what he had levied; but that was a question of precedence between several judgment creditors; and the

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[a] 2 H. Bla. 582. See also *R.* v. *Bishop of London*, in a cause of *Flannagan* v. *Tomkins, clerk*, 1 D. & R. 486; and *Bennett* v. *Apperley, clerk*, 9 D. & R. 673.

one whose writ had first issued having taken away the authority of the Bishop by exacting from him a peremptory return, was thereby held to have lost his priority. In his case, therefore, it would have been wiser to have ruled the Bishop from time to time to return the amount of the sum levied. But no general rule upon the subject is in that case established, and it does not touch the question now before the Court. In the present case nothing more in fact is wanted than that the Archbishop should comply with the terms of the present rule, and enable the defendant to judge whether he has been fairly dealt with by the sequestrator, by furnishing full and satisfactory accounts up to the commencement of the present year.

Patteson, J.—I am of opinion that the defendant was not entitled, as of right, to call upon the Archbishop to return the writs. So much of the rule as relates to the *distringas* and to the costs must be discharged, and the Archbishop may amend his return by stating what has been levied under the writs of *levari facias*, and what he claims to deduct for the costs and charges attending the levy.

Rule discharged. *Hart* v. *Vollans, Clerk; Birnie* v. *Vollans, Clerk; Gray* v. *Vollans, Clerk;* June 7, 1832. K. B. P. C.

NOTES OF THE WEEK.

LEGAL OBITUARY.

We have to record the decease of James Stephen, Esq., late one of the Masters in Chancery, of whom we shall be able shortly to give an authentic memoir, and therefore defer any imperfect account at present.

STATUTES OF 2 & 3 WM. 4.

In the Monthly Record for October, we shall give the titles of the Public General Acts passed during the late session, 127 in number. The Local and Personal Acts declared Public, and to be judicially noticed, are 113. There are also 34 Private Acts, printed by the King's Printer, the printed copies of which may be given in evidence, and 10 others, not printed, which are chiefly acts of naturalization of foreigners, change of name, &c. As one of our Contributors has observed, the King, Lords, and Commons, in Parliament assembled, are "pretty considerable" Authors.

COMMON LAW SITTINGS.

In the Common Pleas the Sittings at Nisi Prius in *Middlesex* are the 14th, 17th, 21st and 27th of November; and in *London*, the 8th, 16th, 23d, and 28th.

ANSWERS TO QUERIES.

COMMON LAW.

BANKRUPTCY.—ACTION. PP. 271, 302, & 351.

Upon consideration, I must beg leave to differ from your correspondent J. B. T., and retain my former opinion; and for the following reasons: 1st, I think that if the legislature had intended that the bankrupt's effects should *not* vest in the official, jointly with the creditors' assignee, and had merely meant to make him a "*receiver*" of the estate, it would not have so created him by the name of an "assignee." 2d, That the words of the act (whatever may have been the intention) are too clear to admit of any such construction. Sec. 22, after creating official assignees, goes on thus, "one of which said official assignees shall in all cases *be en assignee* of each bankrupt's estate and effects, *together with the assignee* or assignees to be chosen by the creditors." Are these the terms in which the legislature intended to create a mere *receiver?* Could any one gravely contend, in the face of these words, that the bankrupt's estate vested only in the creditors' assignee?—that "assignee" means only "receiver?" The same section continues thus: "Provided always, that until assignees shall be chosen by the creditors of each bankrupt, such official assignee, so to be appointed to act with the assignees to be chosen by the creditors, shall be enabled to act, and shall be deemed to be, to all intents and purposes whatsoever, a *sole* assignee of each bankrupt's estate and effects." And then sec. 25 enacts, that the personal, and (sec. 26) the real estate, shall vest in the assignees or assignee for the time being, *by virtue of their appointment*, without any assignment or conveyance. Can it be said, in the face of this, that *no legal estate vests* in the official assignee?—that he is only a receiver? I will only ask J. B. T. whether, if it were requisite to issue process before the creditors chose an assignee (to save the statute of limitations), he means to say it would *not* be done in the name of the official assignee, he being only a *receiver?* I believe there has not been time for any decision on the subject; still, as the subject is important, I should like to have the opinions of some of your other correspondents. As to the observation, that the official assignee might be liable for costs, &c., I answer, that both solicitor and creditors' assignee are under the control of the Court of Review, which, I have no doubt, would (upon application) see that the official assignee was sufficiently indemnified on the subject of costs. J.

LAW OF PROPERTY AND CONVEYANCING.

MORTGAGE.—REVESTMENT. P. 368.

Provided the money be paid on the day named, the term ceases; but in order to obviate any dispute that might hereafter arise, as to the *lessor* of the term, the safest course to adopt is to *surrender* the term, or so frame

the proviso for redemption, that on payment of the money at the time limited, the mortgagee shall *reconvey* the premises to the mortgagor, or as he shall direct. T. T. P.

BEQUEST. P. 368.

The devise was to *A.* and *B.*, as *joint tenants*; and as the latter is the survivor, he takes the whole interest for his life; and on his decease, the *principal* is to be divided between his children; otherwise the subsequent limitation, "in case they should leave no such issue, then the *whole of such stock, interest, and dividends*, to descend to her nephews absolutely," could not apply, inasmuch as those words clearly refer to a similar *antecedent limitation* to the children of *A.* and *B.* T. T. P.

DEVISE.—ANNUITY. PP. 304, 333, 367.

In reply to your correspondent H., I have reconsidered my opinion, and cannot see any reason whatever to alter it. The chief point in a will, is to consider what was the *intention* of the testator at the time when he made his will; which, in this case, I think evidently was, that the portion of 700*l.* should be *vested in the son* or sons of *D.*, when they respectively attained the age of twenty-one, and in *the daughter* or daughters, at that age *or marriage*, whichever should first happen; but that such portion was not to be payable to them, *although those events might occur*, until the decease of *D.* Such is the mode frequently adopted in family settlements; and though the testator has not used those technical words which are requisite in a deed, such want of formality would not prevent a similar construction from giving effect to such his intention. E. M.

PRACTICE.

BILL AGAINST ATTORNEY.—INDORSEMENT. P. 368.

1. A bill against an attorney is not "process." Process is notice to appear, which, to an attorney, who is supposed to be always present, is unnecessary; and the objects of indorsing on process the amount claimed are, as I understand it, to give the defendant notice of the nature of the action, and an opportunity of saving the costs of a declaration. In the case of an attorney, the former is done by the declaration or bill delivered to him, with particulars of demand annexed; and the latter is, from the nature of the proceedings, necessarily unattainable. J. B. T.

2. It was decided by Mr. Justice *Patteson*, last Easter term, on hearing a similar case argued before him in the Bail Court, that a bill against an attorney was not such a *process* as came within the operation of the new rules of court. I am sorry I cannot give the name of the case. E. M.

QUERIES.

LAW OF LANDLORD AND TENANT.

DISTRESS.—DETACHED PREMISES.

A house, with blacksmith's shop *detached*, are let under one tenure, and at an entire rent. The shop, containing the usual implements of trade, is always open, and there is nothing, or not sufficient else therein to satisfy a distress for rent in arrear; and the house, in which there is property more than sufficient to answer such distress, is so watched and guarded, as that the landlord cannot enter without force. Can the landlord, under such circumstances, justify a distress of the implements of trade? or, having commenced distraining in the shop, force an entrance into the house, to complete same?

A SUBSCRIBER.

COMMON LAW.

PAWNBROKER.

Can any of your readers point out a case in the superior courts, which may have been decided, as to the liability of pawnbrokers to make good the amount of property pledged with them, in the event of its being damaged or destroyed by fire? The distinction I should be inclined to draw, would be, that if the fire happened "by the default, neglect, or wilful misbehaviour of the person or persons with whom the same were pledged or pawned, his, her, or their agents or servants," (to use the words of the act,) then the pawnbroker, "his executors, administrators, and assigns," should be responsible for the loss; but if the fire happened by the neglect, &c. *of a neighbour*, or *by lightning*, that the pawnbroker should, in that case, not be liable for the loss, and the pawner should have no further claim on him for the value of it. J. P.

COPYHOLD.—ADMISSION.

A. B. lately died intestate, seised of a copyhold estate, leaving a widow and infant son. The son is since dead. The widow is entitled to the whole of the estate for her life, in right of her free bench. On the death of the son, the estate descended to the eldest brother of *A. B.* (the father). The widow and the heir wish to sell the estate (which is very small): the widow releasing her claim to free bench, to save the expense of admission. Can the heir at law surrender now without admission? Can the widow release her right to free bench without admission? and can the lord claim a fine on the death of the father, and another fine on the death of the son? And can the lord compel the widow to be admitted to her free bench? No Court has been held since *A. B.'s* death. W. T.

UNIFORMITY OF PROCESS ACT.—ATTORNEY.

By the act of 2 W. 4. c. 39, it is enacted, that the writ of summons shall be the commencement of personal actions, where it is not intended to hold to bail, &c.; and that it shall, "whether the action be brought by or against any person entitled to the privilege of peerage or of parliament, or of the Court wherein such action shall be brought, or of any other Court, *or to any other privilege*, or by or against any other person, be according to the form contained in the schedule to this act annexed, marked No. 1." Does this apply to the privilege of attorneys and solicitors?

J. B.

MISCELLANEA.

ANSWER TO MOOT POINT. P. 384.

Unto the Roman lawyer thus I say,
In answer to his "moot point," rais'd to-day:
Whereas the father (the testator) died,
And for the event, that chanc'd, fail'd to provide,
And "Justice" thus was left (alas!) to find
And to discover how the father, kind,
(Had he but thought,) would have express'd his mind;
It seems but right (to me, at least,) to say,
One half the amount the executor should pay
Unto the son; the daughter and her mother
Taking in equal moieties the other.

G. R. F.

LORD BACON'S HISTORICAL CHARACTER.

Lord Bacon was the man of highest intellect among the writers of history; but he was not the greatest historian. History ought to be without passion; but if it be without feeling, it loses the interest which bestows on it the power of being useful. The narrative of human actions would be thrown aside as a mere catalogue of names and dates, if it did not maintain its sway by inspiring the reader with pity for the sufferer, with anger against the oppressor, and with earnest desires for the triumph of right over might. The defects of Bacon's nature conspired with the faults of his conception of history to taint his work with lukewarm censure of falsehood and extortion, with a cool display of the expedients of cunning, and with too systematic a representation of the policy of a monarch in whose history he chose to convey a theory of kingcraft, and the likeness of its ideal model. A writer who has been successful in unravelling an intricate character often becomes indulgent to the man whose seeming inconsistencies he has explained, and may at length regard the workings of his own ingenuity with a complacency which prevails over his indignation. Aristotle, who first attempted a theory of usurpation, has escaped the appearance of this fault, partly because sensibility is not expected, and would displease in a treatise on government. Machiavel was unhappily too successful in silencing his abhorrence of crimes; but this fault is chiefly to be found in "The Prince," which is a treatise on the art of winning and keeping tyrannical power; which was destined by the writer neither to instruct tyrants, nor to warn nations against their arts, but simply to add the theory of these arts to the stock of human knowledge; as a philosophical treatise on poisons might be intended only to explain their nature and effects, though the information contained in it might be abused by the dealer in poison, or usefully employed for cure or relief by the physician.

Lord Bacon displayed a much smaller degree of this vice; but he displayed it in history, where it is far more unpardonable. In the singular passage where he lays down the theory of the advancement of fortune (which he knew so well and practised so ill), he states the maxim which induced the Grecian and Italian philosophers to compose their dissertations, "that there be not any thing in being or action which should not be drawn into contemplation or doctrine." He almost avows an intention of embodying in the person of his hero (if that be the proper term) too much of the ideal conception of a wary, watchful, unbending ruler, who considers men and affairs merely as they affect him and his kingdom; who has no good quality higher than prudence; who is taught by policy not to be cruel when he is secure; but who treats pity and affection like malice and hatred, as passions which disturb his thoughts and bias his judgment. So systematic a purpose cannot fail to distort character and events, and to divest both of their power over feeling. It would have been impossible for Lord Bacon, if he had not been betrayed by his chilling scheme, to prefer Louis XI. to Louis XII., and to declare, that Louis XI., Ferdinand the catholic, and Henry VII., were the "*three magi among the kings of the age*;" though it be true that Henry was the least odious of the three royal sages.

It is due in the strictest justice to Lord Bacon not to omit, that the history was written to gratify James I., to whom he was then suing for bitter bread, who revised it, and whom he addressed in the following words:—"I have therefore chosen to write the reign of King Henry VII., who was in a sort your forerunner; and whose spirit, as well as his blood, is doubled upon your majesty." Bacon had just been delivered from prison; he had passed his sixtieth year, and was galled by unhonored poverty. What wonder, if, in these circumstances, even his genius sunk under such a patron and such a theme!—*Sir James Mackintosh.*

The Legal Observer.

VOL. IV. SATURDAY, OCTOBER 27, 1832. No. CVI.

——— "Quod magis ad NOS
Pertinet, et nescire malum est, agitamus."
HORAT.

THE GENERAL REGISTRY QUESTION, AND THE REPORT OF THE SELECT COMMITTEE.

[*Continued from p.* 387.]

WE now resume our review of the arguments in favour of a General Registry, contained in the Report of the Select Committee on that subject.

They point out the injustice which often arises from the doctrine of Courts of Equity, relating to the tacking mortgages, and the squeezing out mesne incumbrancers, which they consider a general registry would remedy; but they would not, of course, deny that this injustice may be remedied by legislative enactment; and this we consider one of the essential faults of their Report. They point out evils existing in the present system, and then mention the registry as the remedy; but they seem at times to forget that it is not the only remedy. We can, of course, have no objection that the defects of the existing system should be cured. We only object to a nostrum like the General Registry, which would, in our opinion, introduce greater evils than those at present existing. They also consider that a General Registry would be a benefit in all mortgage transactions, as it would enable the lender to ascertain with promptness and certainty the exact extent to which the estate had been already encumbered by the borrower.

"If this could be accomplished, the mortgagee would lend with more confidence, and the mortgagor would effect his loan with greater readiness: the necessity would cease, which now exists, of risking the title-deeds to the whole estate upon borrowing the first small loan. It would enable the party to obtain successive loans from different mortgagees, who would in their turn lend, with a full knowledge of all prior incumbrances, but with perfect security that they would be preferred according to their actual priorities. There may be no reason why an estate is not as ample a security for a second or third mortgage as it is for the first; and yet the want of the title-deeds, and the hazard which subsequent mortgagees incur, is such as, in the present state of the law, to throw considerable difficulties in the way of such loans. So inferior a security is a second mortgage, that trustees are not justified in lending money upon it; but if the dealings with the estate could be known with certainty, a second mortgage would be substantially as good a security as a first, provided the estate was sufficient to pay both."

The Report then goes on to consider the effect of a general registry on mortgages by deposit of deeds, which the Committee, we are surprised to see, "cannot be supposed to seek to countenance or protect," as they are in direct opposition to the statute of frauds, and a manifest fraud on the revenue. They admit, for they could hardly do otherwise, that "they have been of great service to bankers in times of commercial distress," and "of the greatest assistance to small farmers *and others*, who are thus on the sudden enabled to meet a pressing demand;" and they mention that the destruction of this convenient mode of obtaining relief has been an objection to a general registry. The Committee consider, however, that the be-

nefit may still be retained, together with a registry. "The borrower," they consider, "will produce to his banker his duplicate deed, with the certificate of registry endorsed. The banker will then lend upon the confidence he has in the assurance of the party borrowing that no subsequent deed has been registered, as he now does upon the assurance of the borrower that the deeds he produces are in reality the title to his estate." Now we do not think this will be the case. The ownership of the property of the borrower is more or less within the knowledge of his banker; and it is on that confidence, and very rarely on any personal trust, that the money is lent; but with the contents of the registry, the banker must be unacquainted. He will at once say that he will consult the Registry: it would be the height of imprudence for him not to do so. We do not see, therefore, that this great objection to a registry is removed by the Report.

The Committee then consider "the most prominent objection" to a General Register —the exposure of men's affairs. One part of this objection is, the disclosure of defects in title. It has been repeatedly dwelt upon, and it is only fair to state the answer fully.

"If it were proposed that all title-deeds now existing should be placed upon the register, undoubtedly the greatest inconvenience would result from the disclosure, which would inevitably take place, of defects in titles; and in looking at the objection which has been made upon this ground, whether by intention or accident, it is not for the Committee to say; but it does appear to the Committee that an apprehension has been excited, encouraging the impression that registration would produce an exposure of all existing defects. The Committee consider that there is no foundation whatever for such an apprehension. No deed that now exists will ever be recorded. When a purchaser has accepted a title, he will put upon the register the instrument by which the title, so far as it depends upon the conveyance to himself, is perfected. He will take care that this deed is effectual to give him the estate for which he has contracted; that it discloses nothing of prior unregistered instruments which can in any way affect his interest; and it can in no wise prejudice him to show to the world that he has really become the owner of that which he intended to make his by purchase. Whoever buys from him, or his successors, will trace the title up to the first registered deed, and from thence (if necessary) through the unregistered deeds which show the older title. If the title appearing on the register be not of sufficient standing to afford a warranty against all adverse claimants, the seller must show his title by reference to older deeds; but to none, except those he is actually dealing with, will such disclosure be made. If the title is so far perfect upon the register as not to require the inspection of the older deeds, it must rest entirely upon the contents of the registered deeds. But no defect patent upon those deeds ought to be concealed. Those deeds ought to be disclosed in such a manner as to preclude or defeat all persons who have no interest, and to let in the rightful owner. An exposure of this kind, and with this view, cannot, in the opinion of the Committee, be too open,—it is the very object and chief aim of registration."

This appears to us the best answer that has yet been given to this part of the objection. They then refer to the old arguments, of the registries of other countries, and of wills; and then fairly state the effect of a General Registry in disclosing mortgages and debts, and thereby exposing a man's necessities, and injuring his commercial credit. They admit that such disclosure may be "painfully felt by persons who, borrowing with no improper motive, have an undoubted right to retain within their own breasts the secrets of their private embarrassments." The Committee rely, however, upon the disposition in this country not to pry into others' affairs. With respect to the dealings of merchants and bankers, they consider the public disclosure will be beneficial, as it will put an end to all false credit.

They further consider, that if a General Registry be admitted to be expedient by Parliament, that its expense may be considered more fully. They admit that if the Registry were to resemble those of Yorkshire and Middlesex, in the delay to be occasioned by it, the objection would be unanswerable; but they consider the plan recommended by the Real Property Commissioners as not obnoxious to this evil. They further consider, that if registration be adopted, the Register should contain the whole contents of the deed. They then conclude their report as follows:

"After mature deliberation, the Committee are unanimously of opinion that a General Register of all deeds and instruments affecting land will be of decided advantage as regards large purchases. With respect to smaller transactions,—especialy those in the country, in which the more cumbrous and intricate proceedings of the law are generally dispensed with,—the Committee believe that the same facility which would be afforded by a general register in dealings with large estates, applies equally to sales of small properties; yet inasmuch as the expense of registration will be more severely felt by the latter than by the former, *and as sales of small estates are so much more numerous than transfers of great properties, the Committee feel some doubt whether the benefits to be derived will more than*

compensate for the certain expense to be incurred. However, as it is plainly impossible to fix any limit which would not lead to this anomalous result, that all property above a certain value should be governed by one law, while all below it should be regulated by another, the Committee are, upon the whole, of opinion, that if the cost of registration could be so adjusted as to be comparatively small upon purchases below a certain value, the system of registration would be made most perfect, by being made applicable to all lands, without reference to their value."

We have now stated all the material parts of the Report. In some particulars it appears to us inconclusive, and to shew an insufficient acquaintance with the actual state of facts. It manifests, however, an anxious desire to arrive at a just conclusion. It is moderate in is tone; and although not distinguished in its style, is always clear, and generally precise. We consider it, altogether, a valuable document.

PARLIAMENTARY RETURNS.

CHANCERY FEES AND EMOLUMENTS.

Hanaper Office.

	£	s.	d.
Emoluments of the Hanaper Office, 1831 - - -	4,706	15	4
Expences, including salary to Deputy, and fees for his use -	318	14	0
Net profit - -	4,388	1	4
Emoluments of the office of Register of Affidavits, from 1st Michaelmas Term 1830 to 1st Michaelmas 1831 - -	3,106	4	4
The expences, including salary to Deputy, who receives no fees for himself - - -	1,184	17	9
Net profit - -	1,921	6	7
Emoluments of the office of Clerk of the Patents in 1831	817	12	6
The expences, the Deputy having had no salary, but having received fees for his own use, to the sum of - - - -	82	17	5
Net profit - -	734	15	1
The emoluments of the Prothonotary of the Court of Chancery - - - - -	105	8	0
The deductions - - -	7	18	0
Net profit - -	97	10	0

F. G. SETON.

Subpœna Office.

	£	s.	d
Net emoluments from fees for one year, ending 5th January 1832 - - - - - -	302	0	

W. COURTENAY.

Clerk of the Crown in Chancery.

	£	s.	d
Emoluments of the office of Clerk of the Crown in Chancery, from 5th January 1831 to 5th January 1832 - -	3,309	9	11

The year 1831 presents a much larger amount than the usual annual average.

EDW. WILBRAHAM,
Deputy Clerk of the Crown in Chancery.

Clerk of the Custodies.

	£	s.	d
Fees received from 5th January 1831 to 5th January 1832 -	1,749	13	1
Deduct for rent, clerks, taxes upon the office, &c.	370	0	0
	£1,379	13	1

JOSEPH LINES BOLTON,
Deputy and Under Clerk of the Custodies.

Patentee in Bankruptcy.

Received for 1,865 commissions	7,568	15	10
Ditto for 195 supersedeas -	303	17	6
Ditto for 127 renewed commissions - - - -	257	14	1
Ditto for 33 re-sealed commissions - - - -	11	0	0
	8,141	7	5
Deduct for salaries, stationery, rent, taxes, &c.	1,035	1	1
Net amount received by the Patentee - - -	7,106	6	4

EDWARD SMITH, Clerk.

Chaff Wax.

	£	s.	d.
The salary, fees, and emoluments of the Patentee, from the 5th January 1831 to the 5th January 1832, amount to	1,320	2	11
Deduct land tax (under) -	10	0	0
	£1,310	2	11

JOHN HOLDSHIP, Chaff Wax.

Sealer in Chancery.

The salary, fees, and emoluments received by the Patentee, from the 5th of January 1831 to the 5th January 1832, are £1,057. 3*s.* 8*d.*; and has allowed to his Deputy the sum of £203. 11*s.* 1*d.* out of such fees, &c. &c.

R. HAND.

Clerk of Presentations.

	£	s.	d.
Fees received from 5th January 1831 to 5th January 1832 -	113	16	0
Deduct taxes assessed upon the office, and amount paid to the Deputy - -	33	2	9
	80	13	3

JOSEPH LINES BOLTON,
Deputy Clerk of Presentations.

Clerk of Inrolments in Bankruptcy.

	£	s.	d.
Fees paid on inrolling 439 commissions - - - -	43	18	0
Ditto ditto 431 adjudications -	43	2	0
Ditto ditto 653 assignments -	65	6	0
Ditto ditto 263 certificates -	78	18	0
General inrolments made under particular order of the Lord Chancellor, and office copies -	80	5	8
Gross profit - -	311	9	8
Rent, coals, &c. - £50 0 0			
Clerks' salaries - 80 0 0			
Stationery, binding, books, &c. - - 50 0 0			
	180	0	0
Net Profit - -	£131	9	8

I. T. CHURCH.

Dispensation Office.

	£	s.	d.
The emoluments of the office of Clerk of Dispensations, Licences, and Faculties in Chancery, from 5th January 1831 to 5th January 1832 - - -	432	11	4

GEORGE HUMPHRYS,
JOSIAH HUMPHRYS,
Clerk of Dispensations and Faculties.

REVIEW.

COMPLETE ELECTION GUIDE.

The Reform Act, 2 W. 4. c. 45, dissected, arranged, and illustrated by a Commentary on its various Provisions, with reference to the General Law and Practice of Elections, directing Electors, Candidates, and Officers, in the prosecution and exercise of their Rights, and the performance of their Duties. With the Boundary Act, 2 & 3 W. 4. c. 64. By George Price, Esq., of the Temple, Barrister at Law. James Ridgway, Piccadilly.

WE find this book on our table, and are willing to introduce it to our readers, although we have already apprised them of a whole shelf of others on the same subject. Mr. Price is late in the field, and had but little to glean after his predecessors. He has had, however, the benefit of their experience, and it is but justice to say, he has taken a different method of arranging and communicating the result of his labors. We shall not set ourselves the task of instituting "odious comparisons" between the rival writers on this prolific topic of legal authorship. We may mention, however, that, with the exception of Mr. Wordsworth's book,[a] the present volume is rather more copious than the previous publications. The author will probably be best satisfied by allowing him to speak for himself on the objects and scope of his undertaking. The following is extracted from his Preface:

"The object is to render the reading of that statute more readily intelligible and more easily legible generally; but particularly to the official agents required by the act to administer to its operation, and to such persons as may be interested in the provisions and would avail themselves of the benefits of this law.

"The means by which it has been attempted to accomplish that object are principally these: Every division (by section) of the statute has been again separately dissected and broken, by aid of paragraphs, into the several distinct and often different enactments contained or embodied in each, with a marginal sum of the substance of every integral provision opposed to each enacting or providing clause.

"Appended to the act so dissected and displayed is an analytical Commentary, embracing, comprehensively and succinctly, the principles and practice of the new Election Law, with a minute reference to every sentence of the statute, calculated to establish the accuracy or expose the errors of the explanatory passages.

"The Commentary is composed of propositions for guidance in practice, made up of the various and often numerous provisions, applying to one and the same subject, found scattered in disjointed and distant clauses of the act, but here collected together and united and arranged under the proper head or topic to which each fairly belongs. For example, in stating the first qualification of voters for Knights of Shires, numbered 1 in page 12, the incidents positive and negative are supplied from no less than five several sections of distinct provisions in different parts of the act.

"Thus the several sections of the Commentary are confined to single subjects, following progressively, yet not servilely and inconsequently, the provisions of the act, but as each step is to be taken in order of time, from the first, necessary to registration, down to the last measure required to mature the right to exercise the Elective Franchise, and the course of appealing from the adjudication of the Revising Barrister to the House of Commons.

"The several pages of the act are all headed

[a] Reviewed p. 211.

with a running title of the substantial matter of the contents of each, and the statute and the Commentary are made to refer mutually to and from each other, wherever on the one hand the treatise explains or expounds the sections of the act, and where on the other the Commentary is sanctioned and justified by the terms of the statute.

"The mere wording of the statute has been advisedly varied, and other language has been used, with a view to explain and enlarge the meaning of the Legislature, instead of coasting cautiously along each separate enactment in the very course and in the very terms of the act."

The substance of the existing Laws of Election, as preserved by the Statute, is added to the work. This we consider a useful part. Mr. Price appears to be a warm admirer of the act; but has pointed out, in his Commentary upon it, "well-meant remarks" (as he terms them) savoring of objection to the construction of parts of the act, which, he says, has been very unequally, though, for the most part, admirably drawn.

NEW BANKRUPT COURT, AND OFFICIAL ASSIGNEES.

Mr. Editor,

As your correspondent Aspiro has undertaken to answer and refute my letter on this subject, I trust I shall be allowed to make a few observations in reply; and first, I must beg leave to remark, that Aspiro, instead of answering the whole, has only taken a part of my observations, which embraced, not only a complaint that official assignees are allowed to keep monies under 100*l.* in their hands, but points out the inadequacy of the law to punish them, if they commit a direct breach of the rule, which directs them to pay in forthwith all monies above that amount, and then (after an observation on the very zealous manner in which they performed their duties towards assignees under old commissions) concluded with a proposition for entirely dispensing with the services of these gentlemen.

Now Aspiro only takes up one part of my observations, *viz.* the power of official assignees to retain monies under 100*l.* in hand, which he attempts to justify; and then comes the question, "What was the limit under the old system?" I answer, that it was just the same as under the new one: the assignee then covenanted to pay to the bankers all monies, when they amounted to 100*l*, and in the event of noncompliance, might have been compelled, by an order of the Commissioners, so to do. So under the new system, the official assignee is ordered to pay in all monies, when they amount to 100*l.*, and may,[a] in the event of his breaking such rule, be compelled by the Commissioners to comply therewith. Admitting the old system to be defective in this respect, is the new one any better? Aspiro asks, to what extent I would limit the power of the official assignee? I answer, that the basis on which this part of the act is framed, was the alleged fraud and misconduct of creditors' assignees, and to remove all power of doing wrong, both from them and all other persons in any way concerned in the administration of bankrupts' effects; and I think I am borne out by the act itself, the 22d section of which, after creating official assignees, enacts, that *all* monies, &c. shall be *forthwith* paid in by them. I will ask Aspiro, if this looks like an intention of the legislature to trust official, more than creditors' assignees, with any power? Aspiro talks of expenses requiring immediate liquidation; I will ask, whether the Commissioner is not always accessible, to order the payment of them? and if so, where then is the necessity of trusting official assignees with any power? Aspiro urges the benefit they have been to creditors under *old* commissions—of their exposing villainy, &c.: does Aspiro know of any instances? I know of more attempts than one, and can say, that after the most indefatigable, not to say "persecuting zeal," the mountain has, as yet, only produced a mouse.

But after all, these are but minor points; the rule for paying in money may be altered from 100*l.* to 10*l.*, and a penalty added for non-compliance: old commissions must, under the rapid hand of time, be exhausted, and the zeal of official assignees subside with them; but new commissions, or rather fiats, are springing up every day. Now there was one broad question, or rather proposition, which I put, as to the utility of official assignees? This part of the case Aspiro has refrained from answering. It is to this part of the subject I wish to call his attention. Under new commissions, there can be no old assignees to persecute—no fraudulent solicitors to detect. I wish, therefore, to know the peculiar service of these gentlemen under new commissions, and the objection to entirely dispensing with them. Allow me to add, that these observations are made in the same spirit as those of my friend Aspiro; and to subscribe myself, His and your obliged correspondent,

J.

P. S. You observe, at p. 313, that the Commissioners have no choice, but must appoint official assignees under old commissions. Allow me to set you right: they have a choice. See 19th of the New Bankrupt Rules. J.

[Our remark applied, not to the appointment of official assignees, but to taking the accounts under old commissions, and incurring all the expense and trouble of repeated meetings, against the wish of the creditors, and where there was no probability of their being benefited. Ed.]

[a] Notwithstanding Aspiro hints that I proceed on mere assertion, I gave a positive instance, and then stated, and again repeat, my ability to substantiate the same.

SELECTIONS FROM CORRESPONDENCE.

No. XIV.

ADVICE TO YOUNG PRACTITIONERS.

To the Editor of the Legal Observer.

Sir,

As one of the principal objects of the Legal Observer is to promote the respectability of the profession, you may, perhaps, during the present vacation, afford space in your columns for some observations, which may be the means of guarding inexperienced practitioners against the various occasions of speculation or extravagance which may lead to ruin. I am the rather induced to deprecate this evil, because it is one by which I was myself, some few years since, overpowered, and, upon reviewing the circumstances, I traced them to causes to which many honorable and well intentioned, although ardent minds, are exposed, *viz.* a habit of yielding to impulse—the want of a fixed rule before any important step be taken, of considering all our circumstances with relation to absent parties, and a consequent want of firmness in resisting the applications of those who are present or most importunate. Every individual may know some, in the legal as well as other professions, struggling under difficulties, and who attribute their misfortunes to similar causes. Although the great bulk of the members of the profession are men of eminence, wealth, or independence, as well as of prudence and experience, it is equally true that there are, at all times, very many who are struggling for existence, striving to maintain their establishments in credit, by occasional expedients, and that, of this number, many utterly fail, and sink into the class of disqualified subordinates, or resort to more humiliating modes of living.

The most universal and obvious cause is *extravagance*, relatively speaking. Many men are unconsciously undermined by a careless daily expenditure of small sums: where it does not lead to embarrassment, it frequently generates sharp and discreditable practice, which is resorted to to counteract its effects, and the general character of the profession consequently suffers. Another "occasion of falling" is *an over-covetousness of business*—this is so generally a failing in young practitioners, and in those to whom increased business is necessary for the maintenance of their establishments, that it is a rock on which many split; and I know no class of men of business who are more exposed to the schemes of designing men than solicitors. This thirst for business and connection is well known, as the weak part of a young man of business, to practised, needy, and designing persons, some of whom are the more dangerous by being respectably connected, although, perhaps, virtually disowned by their relatives; and accordingly various plans are devised to tempt a young solicitor to lend or use his money, influence, or credit, for the benefit of such persons. The best general rule is, to do nothing but on one's own strength, as "the facility of borrowing is alike destructive to nations and individuals." According to the present regulations affecting the legal profession, the utmost degree of prudence and economy is necessary to be exercised by those of its members who have no other dependence. The disbursements incident to every branch of business, cause a continual drain on the solicitor's purse; and he frequently sustains considerable inconvenience owing to the "Law's Delay," by which his returns are retarded, although his business be substantially good; and the consequence, to a professional man, of undertaking speculative business, where his own capital is not adequate to sustain him in the event of unfavorable results, are in the highest degree ruinous and destructive of character.

In the above observations I may have recommended nothing but the most ordinary and self-evident rules of conduct; but these, by being recalled to mind, may prove salutary and instructive to some of your readers.

I am, Sir,
Yours, with respect,
CAVEAT ACTOR.

BANKRUPTCY AFFIDAVITS.

To the Editor of the Legal Observer.

Sir,

THERE is nothing more eminently calculated to arrive at a knowledge of the truth, in matters of a legal character, than frequent discussion. I do not, however, desire to occupy, to any great extent, the columns of your periodical on the present occasion; nor, indeed, at any time, when the subject-matter has not utility for its object, and information for its end. With that view, I again address you on the subject of *Affidavits in Bankruptcy*; as it is essentially necessary that the doubts even now entertained respecting them by the Commissioners, in their individual capacity, should be immediately removed, in order that professional men may be satisfied with the exercise of their judgment, and their clients protected from the abuse of it. Several letters have already passed on the subject in question, between myself and a correspondent signing himself "Amicus Curiæ," to which I beg to refer your readers.

It appears the Commissioners are still divided in opinion, as to whether the jurisdiction of their Court extends to affidavits to be exhibited under a country fiat. One Commissioner has actually refused to take one of that nature, under the impression that he is not authorized to do so by the act. The affidavit I speak of, was to prove a debt to a very considerable amount; and after it had been taken by another Commissioner, on the very day of its rejection by the other, it was thought pru-

dent to have the same affidavit re-sworn at the Public Office; it being considered unsafe to rely on a system of such doubt and uncertainty; thereby incurring much loss of time, and an unnecessary expense.

I have related this fact, for the benefit of your readers, to enable them to exercise their discretion, in a matter of so much importance

ASPIRO.

MEMOIR OF SIR ALBERT PELL.

WE have deferred the following notice for some time, until we could satisfactorily authenticate some of the particulars which we had collected. We believe that the statement now laid before our readers may be strictly relied upon, and that the remarks are in unison with the general feeling of the profession.

Sir Albert Pell was the youngest of three sons of Robert Pell, an eminent medical practitioner, in Wellclose Square, an active Magistrate of the county of Middlesex, and a Major in the Militia.

Sir Albert was educated at Merchant Tailors' School, from whence he went to St. John's College, Oxford, where he took the degree of Bachelor of Laws, and afterwards attained the honor of Doctor of Civil Law. He entered as a student at one of the Temples, and became a pupil of Mr. Henry Blackstone, the eminent special pleader. On being called to the bar, he selected for the sphere of his professional exertions the Western Circuit and Hampshire Sessions.

He appears to have cherished a laudable respect for the ancient seat of learning to which he belonged; and not altogether devoting himself at first to the acquisition of legal knowledge, he continued to keep his terms at St. John's College, where he obtained a Fellowship, which he continued to hold till his marriage. He had "committed" poetry (as is said of lawyers) in his youth, and his effusions figure in a collection of Prize Compositions, which attained the distinction of passing through the press.

His legal studies and the duties of his profession, however, called him from those agreeable but unprofitable occupations, and he had soon the good fortune to rise to honourable distinction, in a career where few only can eminently succeed, and where comparative failure amongst the many can inflict no discredit. Many candidates for the splendid prizes of the law, may ascribe their ultimate success in the profession to the distinctions they first obtained as lega authors; but the subject of this memoir owed nothing to the pen. Nor does it appear that he passed through the stage of any extensive chamber practice, or was indebted to the reputation of advising on cases. He was essentially a Nisi Prius advocate; and having practised some years as a junior counsel, was made a Serjeant at Law in 1808. After some years, namely, in 1820, he was promoted to the rank of King's Serjeant, and took a decided lead, not only on the Circuit, but in the Nisi Prius Courts in the Metropolis. We understand he frequently left London for the Assizes with upwards of two hundred retainers; and his practice, we believe, was not less than 6000*l*. a year.

His manner of addressing a jury always indicated the greatest zeal for his client, and his anxiety to do justice to the side of the case on which he was retained. He was a cautious yet energetic advocate, and well understood the temper and feeling of the juries he was accustomed to address. He was much esteemed for his patience and courteous manner at the consultations which precede the trial of important cases; and his laborious and anxious attention to the details of business ensured the approbation even of the unsuccessful suitor, and mitigated the disappointment of defeat by the conviction that no pains had been spared to obtain a different result. With becoming, but far from servile respect to the Court, he ever firmly maintained the interests of his client, and always succeeded in commanding the attention of the Court.

Sir Albert was at all times a fluent, and often an eloquent speaker, and he possessed also the rare excellence of being a successful examiner of witnesses. An instance of his skill in this difficult department is related on a trial at Bristol. A hostile witness had been called to prove a fact, which it was well known he could establish; but he baffled the learned counsel for nearly an hour. At length the Judge interposed, intimating that it was useless to attempt to carry the examination farther. Mr. Pell, however, said he had already obtained sufficient to enforce the rest, and begged permission to proceed. After a few more questions, founded on the admissions previously extracted, the witness at length gave way, muttering that it was no use to hold out any longer: he admitted he was present at the time in question; and finally established the facts on which the cause depended. This triumph of skill and perseverance over

a reluctant witness excited the cheers of the auditory. One of the early cases in which he was engaged (though not as leading counsel) was the trial for crim. con. of Colonel Paulett against Lord Sackville, the success of which much depended on the skilful examination of the witnesses, and this burden chiefly rested on Mr. Pell. The plaintiff, for whom he was concerned, recovered 2000*l.* damages. In concluding this part of the memoir, it may be noticed that he was the leading counsel in Lord Portsmouth's case; one of the latest in which he took a distinguished part.

In 1825 he quitted the western circuit on account of ill health, but did not formally retire from the Bar. We are not aware, however, that he subsequently accepted any briefs.

A few years afterwards, when he had recovered his health, he became a very active magistrate for the county of Middlesex. He generally attended the Sessions as well as the Bench of Magistrates on all public occasions, and was instrumental in correcting no inconsiderable waste in the expenditure of the public money, and conferring benefit on the community and the county at large, by the reformation of other abuses.

In December 1831, the Serjeant was appointed one of the Judges of the Court of Bankruptcy, and took his seat next to the Chief Judge. On this occasion his Majesty was pleased to confer upon him the honor of Knighthood. His character as a Judge comes under review under circumstances somewhat unfavorable. The Court of which he was a member has not yet attained a settled practice, and the new system under which it was established has not surmounted the objections with which it was assailed. Had Sir Albert passed from the zenith of his practice at the Bar to the Bench of the New Court, he would even then have been regarded with jealousy, as coming from a Court but little acquainted with cases of Bankruptcy. Having many years retired from the Bar, his appearance on the Bench was altogether unlooked-for, and he was contrasted with Sir George Rose, whose learning and practical acquaintance in the law as well as the routine of Bankruptcy business, gave him a decided advantage in the estimation of the practitioners of the Court,—however different might be the conclusions of the public. We are unable to judge what would have been the result of a longer judicial career; but it is probable that his unquestionable talents, stimulated by the high sense of public duty which he always entertained, would ultimately have secured him a reputation as a Judge, second only to his excellence as an Advocate.

We close our notice with the incidents of a domestic nature which have come to our knowledge. In 1814, he married the honorable Margaret Letitia Matilda St. John, second daughter and one of the co-heiresses of Lord St. John.[a] He had six children, five of whom,—three sons and two daughters—are now living. In 1818 Sir Albert purchased of Mr. Serjeant Sellon, an estate at Pinner Hill, Middlesex, where he resided with Lady Pell and his family for many years. Here he was accustomed, as during the previous part of his life, to rise early both in the winter and summer season; and here he enjoyed the healthful exercise of superintending the improvement of his lands and pleasure grounds.

On the 22d of August last, without any apparent cause, he exhibited symptoms of an approaching fever, which rapidly increased, and which all medical aid failed to subdue. On the 6th of September he died, aged 64, at the house in Harley Street which he had occupied since his appointment as a Judge of the Court of Bankruptcy.

NISI PRIUS SITTINGS.

Michaelmas Term.

KING'S BENCH.

In Term.

MIDDLESEX.		LONDON.	
Monday,	Nov. 5		
Thursday,	8	Saturday,	Nov. 24
Friday,	23		

After Term.

Tuesday,	Nov. 27	Wednesday,	Nov. 28

The Court will sit at eleven o'clock on the 5th, 8th, and 23d: at twelve on the 24th; and at half-past nine on the other days.

Causes in the List on the 5th and 8th of November not disposed of on those days will be tried by adjournment on Tuesday the 6th, Wednesday the 7th, Friday the 9th, and Saturday the 10th of November.

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[a] The eldest sister of Lady Pell was married to Baron Vaughan, and the youngest to a clergyman.

COMMON PLEAS.

In Term.

MIDDLESEX.		LONDON.	
Wednesday,	Nov. 7	Thursday,	Nov. 8
Wednesday,	14	Friday,	16
Wednesday,	21	Friday,	23

After Term.

Tuesday,	Nov. 27	Wednesday,	Nov. 28

The Court will sit at eleven o'clock in the forenoon on each of the days in Term; and at half-past nine precisely on each of the days after Term.

EXCHEQUER.

In Term.

MIDDLESEX.		LONDON.	
First Sittings.		*First Sittings.*	
Thursday, Nov. 8.		Monday, Nov. 12.	
Friday, Nov. 9, by adjournment.		Wednesday, 14th by adjournment.	
Second Sittings.		*Second Sittings.*	
Friday,	Nov. 16	Monday,	Nov. 19
		Wednesday, by adjournment.	21

After Term.

Tuesday, 27th.	Not appointed.

The Court will sit at ten o'clock.

SUPERIOR COURTS.

KING'S BENCH.

[Before the Four Judges.]

SETTLEMENT BY APPRENTICESHIP.

Where a pauper apprentice resided and was fed at his mother's house, at the instance of his master: Held, that this was a sufficient residence under the indentures to confer a settlement.

The pauper was bound apprentice, and served his master some time in *A.*: he then went, with his master's consent, to serve a second master, in another parish. He afterwards returned to his master, in *A.*, who said he had no work for him, and made an agreement with the pauper's mother for his board and lodging, and paid her for them. After his return, he did not perform any services for his master. The question was, whether this residence with the mother, and residence under the indentures, was sufficient to confer a settlement in *A.*

F. Pollock and *Coleridge*, serjeant, in support of the order of sessions, cited *Rex* v. *Charles*, Burr. S. C. 706; *Rex* v. *Barmby in the Marsh*, 7 East, 381; *Rex* v. *Stratford on Avon*, 11 East, 176; *Rex* v. *Chelmsford*, 3 B. & A. 411; *Rex* v. *St. Mary Bredin in Canterbury*, 2 B. & A. 382.

Crowder, contrà, relied on *Rex* v. *Foulness*, 6 M. & S. 351; *Rex* v. *Brotton*, 4 B. & A. 84.

Per Curiam.—The residence at the mother's house was the same as if it had been at the master's house. The pauper returned to his master, because his master was bound to receive and maintain him. The master performed his part of the contract. This case comes within the decision of *Rex* v. *Charles*. The residence was under the indentures, and no actual service is necessary.

Rex v. *Inhabitants of A.*—Order of the sessions quashed, April 25th, 1832. K. B. F. J.

SET-OFF.—NONSUIT.

Where goods sold have been the subject of a set-off in one action, the Court will nonsuit the plaintiff, in an action brought by the latter for their amount.

Action for goods sold and delivered.

Campbell objected, that the plaintiff must be nonsuited. The clerk of the plaintiff's attorney proved that the goods had been the subject matter of a set-off, in a previous action brought by the defendant against the plaintiff, in the Palace Court; and that the plaintiff failed in the proof of the set-off.

On the authority of *Hennell* v. *Fairland*, 3 Esp. 104, Lord *Tenterden* nonsuited the plaintiff.—*Johns* v. *Bodkin*, Feb. 10th, 1832. K. B. F. J.

KING'S BENCH.—PRACTICE COURT.

ESSOIGN DAY.—TERM.—SIGNING JUDGMENT ON WARRANT OF ATTORNEY AFTER PARTY'S DEATH.

A judgment signed on a warrant of attorney between the essoign day and the first day in full term, of the term subsequent to the death of the defendant, is regular; the three days previous to the day provided, by the 11 *G.* 4, *and* 1 *W.* 4. *c.* 70. § 6, *for the commencement of the term, being now no part of the term.*

Robinson shewed cause against a rule for setting aside a judgment and execution on a warrant of attorney, on the ground that the judgment had been signed irregularly. The facts of the case were these. The warrant of attorney to confess judgment was given by the defendant on the 7th April, 1828. The defendant died on the 13th April, 1832. Judgment was signed on the 14th April, 1832, as of Hilary term in that year; the officer endorsing the day when the judgment was actually signed. The essoign day of Easter

term was the 12th April; and the firstday in full term was the 15th. The objection was, that the judgment being signed after the essoign day, was irregular. He submitted that the judgment was regular. First, the course taken by the plaintiff was admitted to be consistent with the present practice of the office; and that it is not a *new* practice appears from *Prigmore* v. *Bradley*,[a] where that practice was admitted as having been established. Nor was the practice unreasonable, although, for some purposes, the essoign day was treated as the commencement of the term, yet, for other purposes, it was not. For instance, when the statute directed that common bail might be filed for the defendant by the plaintiff, of the term in which the writ was returnable, it had been held that bail might be filed between the essoign day and the first day in full term of the term next after the return of the writ. (*Prigmore* v. *Bradley*.) Again, in moving to enter up judgment on an old warrant of attorney, the affidavit must state the party to have been alive on or after the first day in full term (*Eyles* v. *Warren*)[b], and to state that he was alive on the essoign day was insufficient. Further, in proceedings by bill, as this was, the judgment has relation to the first day in full term;[c] although in proceedings by original it has relation to the essoign day, *Whittaker* v. *Whittaker*.[d] Now if this be so, it would follow, that unless the practice now complained of be sanctioned, no judgment could be signed at all in proceedings by bill, during the interval between the essoign day and the first day in full term; for it would be absurd to sign the judgment on the essoign day, and say it should have prospective relation to the day in full term then to come.

Kelly, contrà, contended, that although the constant practice might have been in favor of the course pursued by the plaintiff, yet if the Court found that it was unsupported by sound principle, it would not recognize such a practice. Although judgments might be entered up on warrants of attorney after the death of the party during the vacation after his death, that vacation meant the vacation before the essoign day of the following term. The judgment in the present case, having been signed after that essoign day, was irregular. He cited the judgment of Chief Justice *Holt*, in the case of *Odes* or *Oades* v. *Woodward*,[e] and in which, he said, "First by the course of the court, a warrant of attorney to confess a judgment is not revocable, and the Court will give leave to enter up the judgment, though the party does revoke it; but it is determinable by the party's death. But if the party dies in the vacation, the attorney may enter up the judgment that vacation as of the precedent term, and it is a judgment at the common law as of the precedent term, though it be not so upon the statute of frauds, in respect to purchasers, but from the signing; so that this judgment, being a judgment at common law as of Hilary term, it was a judgment entered when the party was alive, and therefore good, without all question, if the roll had been brought in before the essoign day of Easter term; but that not being done, the question will be, whether we can now admit it to be filed? By the course of the Court, all the rolls of Hilary term ought to be brought in before the essoign day of Easter term, and made part of the bundle of Hilary term; and it is for this reason that what is done in the vacation is looked upon as an act of the term preceding; and there cannot be a *post terminum* roll received, without leave upon motion, which the Court does not grant, but when it appears that no body can be prejudiced, for it is dangerous; and he said that practice should never have his consent to be allowed again, for by this means the Statute of Frauds, and the act for docketing of judgments, will be frustrated; for if the Court allow the filing of this roll in Easter term, as a judgment of Hilary, when it was not among the rolls of that term, how shall purchasers avoid the consequence of it, when it was neither docketed nor brought in? Upon this account the Court disallowed the filing." From this judgment it must be clear that the three days before the first day in full term, including the essoign day, must be considered as part of the term.

Patteson, J.—Formerly a judge used to come down to Court and sit on the essoign day. But, since the passing of 11 G. 4, and 1 W. 4. c. 70, § 6, I apprehend a judge could not come down to Court now, and sit on the essoign day.

Kelly.—That act, by fixing the days on which the terms are to commence, has not altered the practice with respect to the essoign day in such cases as the present. He submitted, that on the ground of the judgment thus signed, not being according to the true practice of the Court, and the frustration of the statute of frauds, which might be the consequence of adopting such a practice, the present rule ought to be made absolute.

Robinson.—As to the case of *Oades* v. *Woodward*, cited on the other side, it differed from a further report of that case in 3 Salk. 116, that there the judgment had not been docketed, and, moreover, it was at that time considered necessary that the rolls of one term should be carried in before the commencement of the next. But it was now decided that the rule of Court on this subject was only *directory*. *Barron* v. *Cross*.[f]

Patteson, J.—I think, upon the last act of Parliament, 11 G. 4, and 1 W. 4. c. 70. § 6, no doubt can arise in the present case. That statute directed that each term should commence on a particular day, and that the first general return day should be on the fourth day before the first day in full term. With this

[a] 6 East. 314.
[b] 4 M. & S. 174.
[c] 1 Tidd. 935.
[d] 8 B. & C. 768.
[e] 1 Salk. 87. 2 Ld. Raym. 766. S. C.

[f] 4 B. & C. 388. 6 D. & R. 386. S. C. See *Inwood* v. *Mawley and others*, 5 D. & R. 350.

provision the 1 W. 4. c. 3. § 2, did not substantially interfere. Those three days previous to the first day in full term, cannot be considered as part of the term. In the case of *Doe* v. *Roe*,[g] which was an application under the 11 G. 4, and 1 W. 4. c. 70. § 36, by which certain facilities are given to landlords, for the recovery of their premises, where their right of possession accrues during Hilary or Trinity term, and the landlord's title had accrued between the essoign day and the first day in full term of Trinity Term; the Court held, that as the sixth section of the same act had directed that Trinity term should commence on a particular day, and the landlord's title having accrued before that day, the title did not accrue during Trinity term. Then, if those three days are not part of the term, they must be a part of the preceding vacation. This judgment, therefore, must be considered as entered up of the preceding term. It seems to me, that the 11 G. 4, and 1 W. 4. c. 70. § 6, has done away with the essoign day for all purposes, as part of the term, and therefore never can be considered as part of the term; except where a writ has been made returnable on any of those three days, a question might arise, whether or not the same consequences would result, as if it had been made returnable on the first day of the term. Then, with respect to the statute of frauds, although Lord *Holt* made those observations in his judgment in the case in Salkeld, no such consequence as he seemed to anticipate could result. By not signing judgment till after the essoign day of the subsequent term, no injury could result to purchasers. For, although the judgment so signed, as between the parties, has relation back to the first day of the previous term, yet, as against purchasers, it only operates from the time of signing. It could, therefore, make no difference to purchasers whether the judgment was signed before or after the commencement of the term. The present rule must, therefore, be discharged, but without costs.

Rule discharged, without costs. *Price* v. *Hughes*, June 13th, 1832. K. B. P. C.

JUDGMENT AS IN CASE OF A NONSUIT.

Where the plaintiff has taken a cause down to the assizes, and it is made a remanet, *the defendant is not entitled to judgment as in case of a nonsuit.*

Whitehurst shewed cause against a rule obtained by *Mansel*, for judgment as in case of a nonsuit. It was a country cause. Issue had been joined last Trinity term, and notice of trial given for the next assizes, and it was made a *remanet*. The plaintiff resealed the record, and took it down at the following assizes, but gave no fresh notice of trial. The defendant's attorney, on that ground, refused to proceed. The plaintiff having once taken down the cause to the assizes, the defendant could not have judgment as in case of a nonsuit. He cited *Mewburn* v. *Langley*[a], and *Denman* v. *Bull*[b].

Mansel, in support of the rule, contended, that though the Court had by its act made the cause a *remanet*, and so the plaintiff was excused from trying his cause then, still it was his duty to try it at the earliest opportunity, which was at the next following assizes, and for that purpose to have given a fresh notice of trial.

Taunton, J.—I am of opinion, that this rule must be discharged with costs. It is not necessary for me to decide whether the plaintiff is bound to give a fresh notice of trial, when a cause is made a *remanet*, because it has been determined in two cases—one in the King's Bench and one in the Common Pleas—that when a plaintiff has complied with the practice of the Court, by taking the cause down to trial at the assizes, and it is made a *remanet*, the defendant is not in a condition to move for judgment as in case of a nonsuit. This is the constant practice, from my own experience.

Rule discharged, with costs.—*Brown* v. *Rudd*, May 3d, 1832. K. B. P. C.

SERVICE OF PROCESS.—BOUNDARIES OF A COUNTY.

If a latitat *be served in a wrong county, and it is sworn that the place of service is "full five miles from any part of the county" into which it issued, that is sufficient to set aside the service, without an affidavit that at the place of service there was not any dispute as to boundaries, and that it was not on the confines of the county in which the service took place.*

B. Andrews shewed cause against a rule obtained by *V. Richards*, for setting aside the service of a *latitat*, and all subsequent proceedings, with costs, on the ground of irregularity. The irregularity consisted in the writ having been directed to the sheriff of Warwickshire, and served in Staffordshire. It was sworn, that the place of service was "full five miles from any part of the county of Warwick." That was not sufficient; for the practice of the Court was, to require an affidavit stating that there was no dispute as to boundaries, and that the place of service was not on the confines of the county[c].

Taunton, J.—It is clear, since the place is five miles from the nearest part of the county of Warwick, that there can be no dispute as to boundaries, except by persons who are determined to create disputes.

Rule absolute, with costs.—*Lloyd* v. *Smith*, May 3d, 1832. K. B. P. C.

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[g] 1 Dowl. Prac. Rep. 179.

[a] 3 T. R. 1.

[b] 3 Bing. 499.

[c] *Vide* Tidd's Forms, 179, s. 5 a. 9th ed. *Storer* v. *Rayson*, 4 D. & R. 179. *Webber* v. *Manning*, 1 Dowl. Prac. Rep. 24.

MIDDLESEX COURT OF REQUESTS.—DOUBLE COSTS.

Where a plaintiff recovers less than forty shillings against a defendant resident within the jurisdiction of the Middlesex Court of Requests Act, and his demand has not been reduced by set-off, the defendant is entitled to double costs.

Thesiger shewed cause against a rule for entering a suggestion under the 23 Geo. 2. c. 33, § 19, the Middlesex Court of Requests Act, to give the defendant double costs, the plaintiff having recovered less than 40*s.* in an action, the defendant residing within the county of Middlesex. The sum recovered was 1*l.* 18*s.* The distinction drawn by the cases is this: where the debt is originally above forty shillings, and it is reduced by partial payments, before action brought, below that sum, the claim is within the jurisdiction of the Court of Requests; but where it is reduced by a counter claim of set-off at the time of the trial, the case is not within the act. Here, then, was no plea of set-off, it is true; but the circumstances of the case shew, that the demand of the plaintiff was cut down by a counter claim on the part of the defendant, and therefore the case comes within that class of decisions which determine that the defendant is not entitled to his costs. He cited *Pitts* v. *Carpenter* [a], *M'Gollan* v. *Carr* [b], *Clark* v. *Askew* [c], *Horne* v. *Hughes* [d], *Chadwick* v. *Bunning* [e].

Platt, contrà, contended, that as there was neither plea nor notice of set-off in the present case, it must be taken, that the plaintiff's claim only amounted, originally, to the sum for which the jury had found their verdict. In *Chadwick* v. *Bunning*, where the action was originally brought for 9*l.* 17*s.*, Lord *Tenterden* observed, "In the absence of all authority, and adverting merely to the particular language of the statute, I should have come to the conclusion, that this was a case in which the plaintiff, having recovered less than 40*s.*, although his original demand exceeded that sum, the defendant was entitled to double costs." The language of the statute clearly prevents any exception being raised in favour of the plaintiff. The words of § 19 are, if "the jury, upon the trial of such cause, shall find the damages for the plaintiff under the value of forty shillings," "no costs shall be awarded to the plaintiff in such action; but the defendant or defendants shall be entitled to and recover double costs of suit." The finding of the jury is, therefore, conclusive as to the defendant's claim to double costs. Here, less than forty shillings damages were found for the plaintiff, and therefore the defendant is entitled to double costs. He cited *Weistell* v. *Atkinson* [f]; *Jordan* v. *Strong* [g]; and *Bateman* v. *Smith* [h].

Taunton, J.—From referring to Mr. Justice *Parke*, who tried this cause, it is clear that the plaintiff's demand was not reduced by a set-off. The question then is, whether the plaintiff's demand, not having been reduced by a set-off, and a verdict for less than forty shillings having been found in favour of the plaintiff, the defendant is intitled to double costs. The cases of *Bateman* v. *Smith*, and *Chadwick* v. *Bunning*, shew, that if the damages found by the jury for the plaintiff, are reduced to less than forty shillings, in consequence of the original contract between the parties, or of part payment before action brought, the defendant is entitled to double costs, under this act. But if the plaintiff had an original demand against the defendant, exceeding forty shillings, and for which a verdict must have been found at common law, before the statute which gave the set-off, the case might be very different. It is not necessary, now, to give any opinion on that point. There are very good reasons why a case, in which the plaintiff's demand is reduced by a set-off, should be exempted from the operation of the statute. Those reasons may be found very pointedly, and very strongly expressed, in the case of *Pitts* v. *Carpenter* [i]. The Court there observed, "how could the plaintiff tell whether the defendant would set off any thing in that action, so as to be bound to chuse that jurisdiction. Besides, he has in effect recovered 4*l.* 15*s.* 3*d.*, because a debt, which he must otherwise have paid, is now satisfied. Here are two causes determined; both of them of greater value than is within the inferior jurisdiction." But as here there was neither notice nor plea of set-off, the plaintiff's demand could only have been reduced below the sum of forty shillings on the ground, that the plaintiff's demand did not exceed that sum. As that is so, the rule must be absolute to enter the suggestion prayed for by the rule.

Rule absolute.—*Jones* v. *Harris*, May 4th, 1832.

Another case, in which the names of the parties were *Humphreys* v. *Amos*, under similar circumstances, and on the same statute, was decided during the term by *Taunton*, J., and in a similar manner.

JUDGMENT AS IN CASE OF A NONSUIT.

Though the rules of H. T. 2 W. 4, did not come into operation until the first day of E. T. 2 W. 4, it is irregular to move for judgment as in case of a nonsuit, after a motion for costs of the day for not proceed-

[a] 2 Str. 1191.
[b] 1 B. & P. 223.
[c] 8 East, 28.
[d] 8 East, 347.
D. & R. 155; 5 B. & C. 532, S. C.

[f] 11 B. Moore, 14.
[g] 5 M. & S. 196.
[h] 14 East, 301.
[i] 2 Strange, 1191.

ing to trial, for the same default, under rule 69. of the first division of rules of H. T.

Platt shewed cause against a rule obtained by *Ball*, for judgment as in case of a nonsuit. By rule 69 of the first division of rules of Hilary term, it is ordered, that "no motion for judgment as in case of a nonsuit, shall be allowed after a motion for costs for not proceeding to trial, for the same default." Here the motion for costs was made last term, and therefore the defendant is not entitled to move for judgment as in case of a nonsuit.

Ball, contrà.—Those rules did not come into operation until the first day of Easter term; and therefore, although the motion for costs was made in Hilary term, the defendant was at liberty to move for judgment as in case of a nonsuit, in Easter term.

Taunton, J.—Here the motion for judgment as in case of a nonsuit was made after a motion for costs for the same default; and therefore, by the rule, the defendant is not at liberty to move for judgment as in case of a nonsuit. This rule must therefore be discharged, but without costs; because the motion for costs was made at a time when it could not be known that this rule would be made of the Court.

Rule discharged, without costs.—*Omardon* v. *Snelling*, May 4th, 1832. K. B. P. C.

BILL AGAINST AN ATTORNEY.—PROCESS, REG. GEN. HILARY TERM, 2 W. 4.

A bill against an attorney is not "process," within the meaning of Reg. Gen. H. T. 2 W. 4; and therefore does not require the endorsement of the amount of debt and costs claimed, as directed by that rule.

Thesiger shewed cause against a rule obtained by *Kelly*, for setting aside a bill against an attorney, on the ground of the amount of debt and costs claimed by the plaintiff not being indorsed on the back of it. The question is, whether a bill against an attorney is within the meaning of Rule 2, Hilary Term, 2 W. 4. It is certainly not a bailable writ or warrant, and although it may be admitted to be process, yet it is not the process contemplated by the rule, which uses the term to express serviceable process, as distinguished from bailable. Besides, an attorney is not within the intention of the rule, as he must be taken to know the costs of the proceedings against him, the communication of which was probably the main object of the rule.

Kelly, contrà, contended, that an attorney was as much within the mischief of the rule as any other person.

Cur. adv. vult.

Taunton, J.—This was an application to set aside a bill filed against an attorney, on the ground that Rule 2 of Hilary Term, 2 W. 4, has not been complied with. That rule is in these terms, "Upon every bailable writ and warrant, and upon the copy of any process served for the payment of any debt, the amount of the debt shall be stated, and the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service, and attendance to receive debt and costs; and that upon payment thereof, within four days, to the plaintiff or his attorney, further proceedings will be staid." The only question is, whether a bill filed against an attorney comes within the denomination of "process." Now, I have a perfect recollection that in more instances than one, at chambers, I have decided, that a bill against an attorney did not come within the meaning of "process." The other Judges have heard the objection taken to the proceeding in this case, and we all concur in opinion, that a bill filed against an attorney does not come within the denomination of process: and for this plain reason, that the object of process is to bring a defendant into Court; but a bill against an attorney supposes him to be in Court. The present rule must, therefore, be discharged.

Rule discharged.—*Snellin* v. *Norton*, 11th May, 1832. K. B. P. C.

NOTES OF THE WEEK.

UNIFORMITY OF PROCESS ACT.

This act will come into operation on the first day of the approaching Term. We have already, in a series of papers, put our readers into possession of the changes which it will effect in the practice of the Common Law Courts,[a] and shall from time to time notice the construction which the Courts may put on the provisions of the Statute, and the Rules which they are authorized to make for the purpose of carrying it into complete effect.

DECISIONS OF THE COURTS OF REVISING BARRISTERS.

The newspapers furnish a daily report of the proceedings in some of these Courts; but it is in our opinion quite useless to give a detail of their proceedings, as the law and practice of the different Courts will necessarily differ greatly. A few weeks will bring back the whole body from their labors, and we have no doubt that some one or more of them will collect the scattered opinions, and furnish an authentic "Prac-

[a] Vide pp. 136, 150, 170, 185, 199.

tice," which will be valuable, after they have had an opportunity to compare notes, and agree upon the leading principles by which they have been and are to be guided. We shall however direct the attention of our readers to any important matter that may arise in the course of the discussions, and which can be usefully brought forward. As the Courts are sitting simultaneously in all parts of the country it is impracticable to keep up the communication of Reports at one place in sufficient time to be serviceable at others.

The greater number of questions which have been agitated relate to *informalities in the written notice* required by the Act. It has been intimated, where a decision has been made against the claim, that the party may tender his vote at the election, and thus an opportunity will be afforded to reconsider the question before a Committee of the House of Commons, in the event of a petition against the return.

Points have also arisen as to persons who have claimed to be rated at an improper place, or after the 20th July, or paid their rates subsequently, though some of them had receipts of an anterior date. Objections have also arisen in consequence of mistakes in returning the names of the inhabitants. These are questions of fact, not of law, and therefore do not come within the scope of our observation.

One point of importance seems to be, whether tenants are entitled to vote who pay a gross sum for rent and assessments, and the latter are paid by the landlord. It appears that in the city of London it has been held that such tenants, or *compound householders*, are not entitled to vote; but the accuracy of this opinion is much questioned.

The omissions of overseers to make proper returns, it has been held, may be supplied by the Barristers. Several questions have been deferred for consideration on claims to be admitted to vote for the county in right of leasehold and copyhold property, where the parties were entitled to vote for a borough. There are also doubts raised regarding *residence*, where the inhabitant does not sleep at the house in respect of which he claims to vote; but if he lives within seven miles, it seems the right must be admitted.

ANSWERS TO QUERIES.

COMMON LAW.

PRINCIPAL AND AGENT. P. 383.

This point, though headed as above, appears to me to be a question of "Reputed ownership," under the 72d section of the Bankrupt Act. I am of opinion that *B.'s* assignees would not be entitled to the goods, as part of his estate, *C.* (the agent) having notice of the sale, and holding the goods on *A.'s* account only until shipment. This case is stronger than that of *Flynn* v. *Matthews*, 1 Atk. 185, where the vendee was held to be entitled to the goods, although left in the possession of the *bankrupt himself*, until they could be conveniently shipped. And see *Knowles* v. *Horsfall*, 5 B. & A. 134, where the above case (*Flynn* v. *Matthews*) is cited. And see *Carruthers* v. *Payne*, 5 Bing. 270.

G. R. F.

SETTLEMENT. P. 368.

In answer to the query of W. C., as to a pauper gaining a settlement in the parish of *O.* by sleeping there, his service having been performed in *Y.*, it is immaterial whether the parish in which a servant *resides* be that in which he *serves*: the settlement was undoubtedly gained in *O.*, by his sleeping there. See *Rex* v. *Spitalfields*, 2 Bott. 276; 8 Mod. 309.

J. A.

SHERIFF'S POUNDAGE.—INSOLVENT. P. 384.

1. The sheriff may maintain an action of debt for his poundage, under the 29th Eliz. c. 4; *Rawstone* v. *Wilkinson*, 4 Maul. & Selw. 255; and is entitled to this poundage, although the defendant go to prison without paying the debt. *Lake* v. *Turner*, 4 Burr. 1981.

G. R. F.

2. The sheriff is entitled to poundage on a *ca. sa.*, though the defendant go to prison without paying the debt; 4 Burr. 1981; or although the defendant be already in the custody of the sheriff when the *ca. sa.* is delivered to him. Tidd's Prac. 1084, 8th ed.

W. H.

BANKRUPTCY.—ACTION. PP. 271, 302, 351 & 398.

The reasoning of J. is not convincing to my mind; but I think it better to let the question drop until it receives a judicial solution, rather than further occupy your pages with unprofitable speculation. I would, however, refer your correspondent to the case of *Ex parte Alexander, re Elder*, Mont. Bankruptcy Cases, 503, which appears to me to assist my view of the case. Mr. J. Rose says, "The official assignee

is merely a *ministerial* officer. The act merely gives him the *custody* of the estate."

J. B. T.

SETTLEMENT.—EMANCIPATION. P. 368.

I think the son gained a settlement in the parish of *O.*; for under a hiring and service for a year, less than forty days *residence* will not gain a settlement. *Goring* v. *Molesworth*, Burn, vol. 4, p. 386; 2 Bott. Pl. 342; Nolan, vol. 1, p. 423. Besides, I should conceive the son was not emancipated; for it has been laid down by the Court of King's Bench (in 1823), that there is no emancipation during minority, except by *marriage, becoming the head of another family, or contracting a relation, such as wholly and permanently to exclude the father's controul*, which do not appear to have been the facts in this case. W. T.

POWER OF MAGISTRATES. P. 384.

In reply to Inquirer, I refer to the 5th Geo. 4, c. 83, § 8, where he will find the authority he questions, given to the magistrates over the property of vagrants. J. P.

LAW OF PROPERTY AND CONVEYANCING.

DEVISE. P. 383.

If it was an estate *tail male*, the younger brother would take, in preference to the daughters of the elder son; see Fearne's Contingent Remainders, p. 31, 4th ed.; but if it was not such an estate, the daughters will certainly take as heirs. W. H.

DOWER.—MORTGAGE. P. 384.

1. It is apprehended (although it appears not to have been actually settled by judicial authority), that where a married woman joins in a fine, for the purpose of giving effect to a mortgage, her dower is absolutely gone, as dower does not attach upon equities of redemption. The subject is fully discussed *in notis* to Byth. Prec. by Jarman, vol. 4, p. 173, where also will be found a copy of Mr. Bell's opinion on the subject. G. R. F.

2. By the reconveyance to *A.* in fee, the right of his wife to dower again arises from such seisin, which will require a fine to be levied, to pass her interest on any disposition of the premises. E. M.

3. If a married woman joins in a fine for the purpose of giving effect to a mortgage, her dower (notwithstanding the redeemable nature of the security in equity), being purely a legal right, is absolutely gone. See Byth. Conv. by Jarman, vol. 4. p. 155 & 173; Hayes' Concise Conveyancer, p. 115; Lord Redesdale's judgment in *Darcy* v. *Blake*, 2 Sch. & Lef. 388.

E. M.

PRACTICE.

WARRANT OF ATTORNEY. P. 386.

The cases which have hitherto been decided on this point, have been those in which, from the reports of them, it would appear, that the warrant has been *joint* only, and not *joint* and *several*. They are, principally, *Rawe* v. *Alderson*, 7 Taunt. 453; *Harris* v. *Wade and another*, 1 Chit. 322, and the cases there cited: and it was in those cases held, that judgment could not be entered up against a surviving defendant. I should think, that the circumstance of the warrant being several, as well as joint, would alter the case, but for the observation of *Gibbs*, C. J., in 7 Taunt. 455. "If a judgment be entered against two, the one standing as a surety, he may have his remedy over; his condition may be materially altered after the decease of the other." J. B. T.

ENGLISH NOTICE UNDER THE NEW PROCESS ACT. PP. 240, 256, 270, 334.

It appears to me, that your correspondents overlook the real point, in this case. The stat. 12 G. 1. c. 29, only requires the English notice to be written upon the copy of "process against the person," *id est*, the *capias*. The "writ of summons," given by 2 W. 4. c. 39, is not "process against the person," or a *capias*, and cannot therefore be within the meaning of the 12 G. 1. c 29. J. C.

UNIFORMITY OF PROCESS ACT.—ATTORNEY. P. 400.

I am clearly of opinion that the 2 W. 4. c. 39. § 1, as to the commencement of personal actions by writ of summons, applies to attorneys and solicitors, and that after the first day of the next term the former practice of filing a bill against them, will be entirely done away with. The words of the statute are so plain, that I think there cannot be a second opinion on the question. "Whether the action be brought by or against *any person entitled to the privilege of the Court where such action shall be brought*, or of *any other Court*, or to *any other privilege*, or by or against *any other person*." What words can be stronger, or more explanatory? and there is no clause in the act excepting or exempting attorneys and solicitors from any liability to such process.

W. H.

QUERIES.

COMMON LAW.

SECOND INDICTMENT.

Suppose *A. B.* fully committed for a felony to the next sessions, and the prosecutor does not appear to prefer a bill of indictment, and

A. B. is discharged by proclamation; can he be subsequently indicted *for the same offence?* and if so, on what authority?

A SUBSCRIBER.

ESCAPE.

Would a sheriff's officer be liable for an escape, in case his house was accidentally burnt down, and his prisoners escaped? W. H.

LOST NOTE.—TENDER.

A., maker of a promissory note, payable on a day certain, intrusts *B.* with the money to pay it. *B.* tenders the money *on the day*. The holder cannot produce the note. *B.* becomes bankrupt. Is *A.* discharged? See *Dent* v. *Dunn*, 3 Camp. 296, where it does not appear that the notes were payable on a specified day.

X. Y. Z.

LAW OF LANDLORD AND TENANT.

EJECTMENT.—DISTRESS.

Pending an action of ejectment by landlord against tenant, can the landlord distrain for rent accruing due pending such action?

W. H.

TRESPASS.

Can a tenant at will bring an action against his landlord for merely walking over the land, to see whether it is cultivated in an husband-like manner, and without committing wilful damage? N. A.

NOTICE TO QUIT.

A. mortgages his estate, in the possession of *B.*, as tenant from year to year, to *C.*, who shortly after gives the tenant notice of the mortgage, and that all rent then due, and thereafter to become due, must be paid to him, as such mortgagee. *B.* has subsequently paid his rent regularly to *C.*, and now wishes to give up possession. To whom is he to give notice of his intention to quit? E. W. S.

LAW OF ATTORNEYS.

SERVICE OF ARTICLES.—UNDERSHERIFF.

In 1827, *A. B.* was articled to *C. D.*, and the articles were duly enrolled in the King's Bench. In the present year (1832), *C. D.* was chosen under-sheriff, within a few months of the expiration of *A. B.'s* articles. The question is, whether *A. B.* can be admitted a solicitor in the Court of Chancery, his articles having been only enrolled in the King's Bench? Or whether, under the circumstances of the case, the Court of King's Bench would allow him to be admitted in that Court, or compel him to serve four months (the time intervening between *C. D.* being chosen under-sheriff, and the expiration of *A. B.'s* articles) with another attorney. C.

MISCELLANEA.

ANSWER TO MOOT POINT. P. 384.

This is a point of *Justice*, not of *Law*;
And he that Justice gets can want no more:
But whoe'er asks it, into Court must come,
Free from suspicion, that he would do wrong.
Now tell me; "*Here* have any done amiss?"—
The answer 's "No."—Well!—then the question 's *this*—
"What was the father's will?" I take it to be clear
He meant a son to have double the mother's share;
But if a daughter, then the wife to claim,
Her daughter's share, and just as much again.
This being so; divide eight thousand pounds
Into seven parts (in fractions they'll abound,
But that's no matter), give the daughter *one*,
Two to the mother, four go to the son,
And then you'll find testator's will is done.
The daughter has one-half her mother's claim,
The son, as said before, as much again.

Z

END OF VOL. IV.

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